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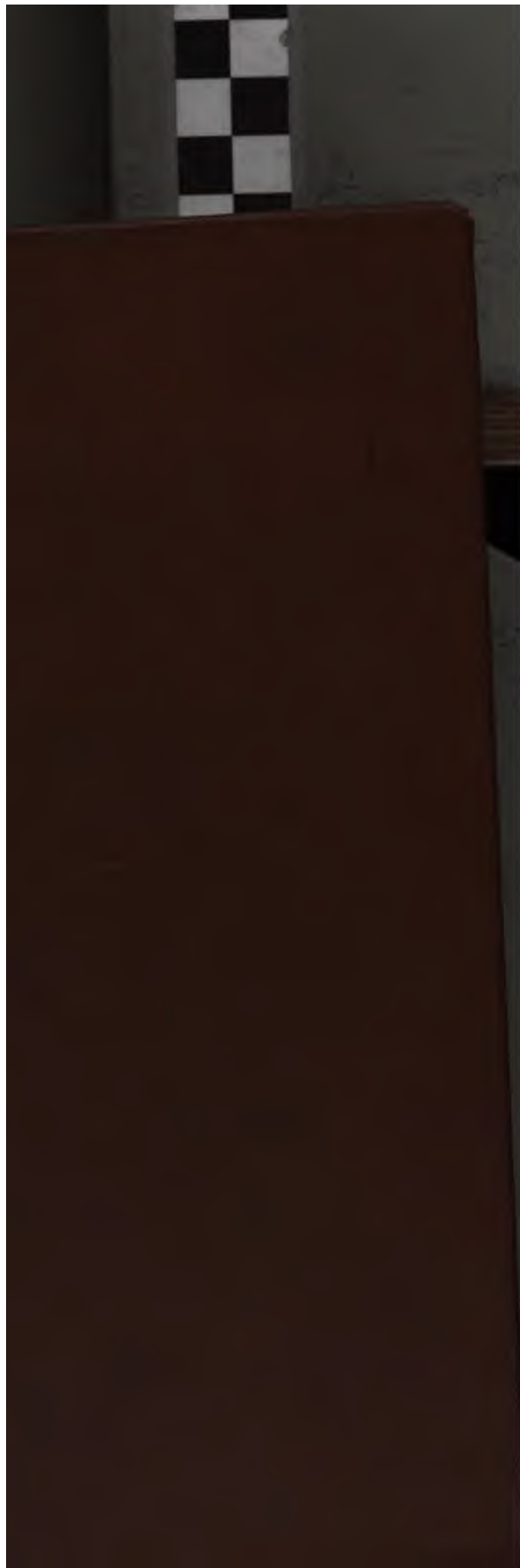
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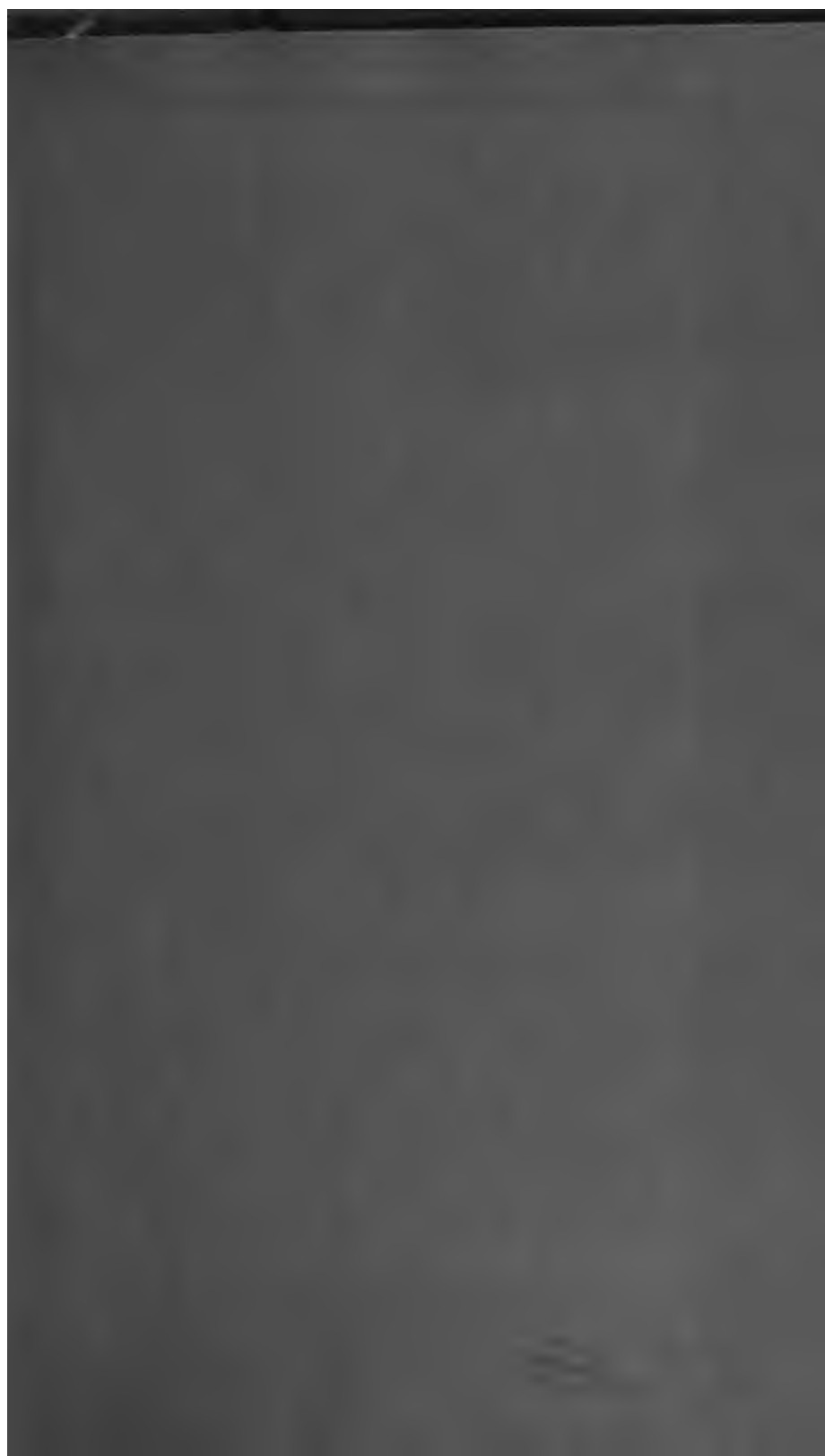
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IOWA


CRIMINAL CODE AND DIGEST

AND

CRIMINAL PLEADING AND PRACTICE.

By J. C. DAVIS.

DES MOINES:
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PREFACE.

As no Digest of the Criminal Law of the State has been published hitherto, and in view of the general desire for, as well as the manifest necessity of, such a work, the author has undertaken to present to the profession a complete Digest and Compilation of the Criminal Statutes of Iowa, with the Decisions of the Supreme Court of this and other States bearing thereon.

The work, as will be noticed, is divided into two parts: Part First, containing Crimes and Offenses, with forms of Informations and Indictments; and Part Second, the Practice and Incidents of Trials; both being arranged alphabetically.

Not only the law under the Criminal Code will be found reproduced, but twenty-eight sections of the Civil Code, sixteen sections of the Laws of 1874, nine sections of the Laws of 1876, and fifty-six sections of the Laws of 1878, all applicable to criminal procedure, are included, thus rendering reference to the Code and Session Laws unnecessary; and every criminal case, in Morris (one volume), G. Greene (four volumes), Iowa (forty-six volumes), and opinions filed (not yet in reports), to July 1, 1878. There will, also, be found a chapter, each, on Bastardy, Contempt, Habeas Corpus, and Mayors' Courts, in criminal proceedings. Also, the usual Table of Cases, and in addition a Topical Table of Cases, not found in law books generally.

The author hopes that the work will be found to meet the requirements of the profession, or, at least, that it will help to lighten the labors of attorneys in this important branch of the practice, in which it frequently happens a case must be tried on short notice. In such cases its value will be apparent.

J. C. DAVIS.

MARION, LINN Co., Iowa, *March, 1879.*



IOWA CRIMINAL CODE AND DIGEST.

ABDUCTION.

SECTION 3866. If any person maliciously, forcibly or fraudulently, lead, take, decoy, or entice away, any child under the age of twelve years, with the intent to detain or conceal such child from its parent, guardian, or any other person having the lawful charge of such child, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. [Limitation by Sec. 4167, three years.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA }
VS. }

The grand jury of the county of Linn, in the name and by authority of the State of Iowa, accuse . . . of the crime of abduction, committed as follows: The said . . . on the . . . day of . . . , 187 . . , at the city of Marion, Linn county, Iowa, did feloniously, maliciously, forcibly and without any warrant, order of court, or authority whatever, lead, take, and entice away, one . . . , a male child under twelve years of age, with intent then and there to conceal such child, from its parent, one . . . (or . . . , the duly appointed guardian of said child, having lawful charge of the same at the time), contrary to and in violation of law.

.
District Attorney 8th Judicial District.

Form approved. Arch. Crim. Practice and Pleading, Vol. 2, page 301.

INDICTMENT.

An indictment for abduction, under a statute which provides the punishment for taking a female under fourteen years of age, from certain persons mentioned, for one of three specified purposes, is not vitiated by alleging that the female was taken for all the purposes; and the allegation of an intent to

do further acts not mentioned in the statute may be regarded as surplusage. *People v. Pearshall*, 6 Park. Cr. R., 129.

ELEMENTS.

This crime is an indictable offense under the common law and made so under most of the statutes in this country. Arch. Cr. Pr. and Pld., 2d Vol., page 301.

CHILD CONSENT.

On a trial for abduction of a child from the state, the child being about four years of age, and was taken from its mother and carried out of the state, it was held that the child must be deemed to have been taken without its consent, and that the purpose with which the defendant carried it away, being the divorced husband of the child's mother, is no justification, though it might affect the measure of punishment. *State v. Farrer*, 41 N. H., 53. To constitute the forcible abduction of a person within the meaning of the statute of Illinois, it is not necessary that physical force or violence be used upon the person kidnapped. It will be sufficient if, to accomplish the removal, the mind of the person was operated upon by the defendant by falsely exciting the fears, by threats, fraud, or other unlawful or undue influence, amounting substantially to a coercion of the will, so that, if such means had not been resorted to or employed, it would have required force to effect the removal. *Moody v. People*, 20 Ill., 315, where the defendant is charged with unlawfully taking a female under sixteen years of age, out of the possession and against the will of her father, and it having been proved that the defendant did take her, but that he *bona fide* believed, and has reasonable ground for believing, that she was over sixteen; held, that this latter fact constituted no defense, and the conviction sustained. This conviction was under 24 and 25 Vict., Ch. 100, Sec. 55, and substantially the same as the Iowa statute herein set out. *Reg. v. Prince*, 2 Cr. Cases, 154; 1 Am. Cr. R., 1.

ABORTION.

SECTION 3864. If any person, with intent to produce the miscarriage of any pregnant woman, willfully administer to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage

shall be necessary to save her life, he shall be imprisoned in the state prison for a term not exceeding one year, and be fined in a sum not exceeding one thousand dollars. [Limitation, Sec. 4167, three years.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA }
vs. }

The grand jury of the county of Linn, in the name, and by the authority of the State of Iowa, accuse . . . of the crime of abortion, committed as follows: The said . . . did, on or about the . . . day of . . . 187 . . . willfully, feloniously and unlawfully administer, and cause to be taken, by one . . . she, the said . . . then and there being pregnant with child, a quantity of a certain noxious substance called . . . (or did use and thrust into the body and womb of said . . . a certain instrument, made of wire, the particular name of which is unknown to the grand jury), with intent to produce a miscarriage, the same not being necessary to save the life of said . . . contrary, etc.

This form is approved. *State v. Hollenbeck*, 36 Iowa, 112. The various statutes of the different states are substantially alike.

INDICTMENT.

The indictment should allege the word *did* do the acts complained of, and a failure to so allege makes the indictment defective, and this word cannot be supplied by intendment. *State v. Hutchinson*, 26 Texas, 111; *State v. Dougherty*, 30 Texas, 360; *Edmundson v. State*, 41 Texas, 496; *Ewing v. State*, 1 Texas Court of Appeals, 362.

TIME AND PLACE.

In a charge, "that at a certain time and place said . . . was pregnant and that the defendant, with intent to cause and produce her miscarriage, did advise and procure her then and there to take, etc.," it was held that the time and place were sufficiently averred. *People v. Crichton*, 6 Park. Cr. R., 363.

UNNECESSARY AVERMENTS.

An indictment for administering medicine to a pregnant woman to procure an abortion, need not allege the particular kind, quantity, or quality of the medicine. *State v. Vanhouten*, 37 Mo., 357; *State v. Vawter*, 7 Blackf., 592.

JURISDICTION.

In a prosecution for an abortion, the jurisdiction is with the

county wherein the medicine intended to produce a miscarriage was administered, and not in that where the miscarriage took place. *State v. Hollenbeck*, 36, Iowa, 112.

ELEMENTS—PERIOD OF PREGNANCY.

The offense is complete, if the medicine, drug, or substance, be administered, or the instrument used with the intent prescribed, at any time during the period of gestation. *Wilson v. State*, 2 Ohio St., 321.

ABORTION—MURDER.

Abortion is murder in the second degree. See title, "Murder," "Abortion."

STATUTE CONSTRUED.

Under the Illinois Statute which reads, "Whoever, by means of any instrument, medicine, drug, or other means whatever, causes any woman pregnant with child, to abort or miscarry, or attempts to procure an abortion or miscarriage, &c.," Rev. Statute, 1874, page 352, it was held that under a charge "that the prisoner did feloniously beat and strike a pregnant woman with intent to cause her to miscarry," that the statute only applies to those who intend to produce an abortion. *Slattery v. People*, 76 Ill., 217; 1 Am. Cr. R., 29.

DEFENSE.

The fact that the child was "quick," and the act producing an abortion constitutes murder, is no defense to a charge of abortion which is a less offense. *Wilson v. State*, 2 Ohio St., 321.

ACCESSORIES.

SECTION 4314. The distinction between an accessory before the fact and a principal is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, though not present must hereafter be indicted, tried and punished as principal.

SEC. 4559. A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not suffi-

cient if it merely show the commission of the offense or the circumstances thereof.

LIMITATION.

The time of limitation in these actions must be governed by the same rule as that of principal.

ACCESSORY—DEFINITION.

An accessory is one who is not the chief actor in the perpetration of the offense, nor present at its performance, but is some way concerned therein, either before or after the fact committed. An accessory before the fact is one who being absent at the time of the crime committed, yet procures, counsels or commands another to commit it. 1 Hale, P. C., 615. It is proper to observe that when the act is committed through the agency of a person who has no legal discretion nor a will, as in the case of a child or an insane person, the incitor, though absent when the crime was committed, will be considered not an accessory, for none can be an accessory of a madman, but a principal in the first degree. Fost., 340; 1 P. C., 118. An accessory after the fact is one who knowing a felony to have been committed, receives, relieves, comforts or assists the felon. 4 Bl. Com., 37. By common law and by some state laws, an accessory cannot be tried without his consent, before the principal. Foster's Crim. Law, 360; *Baron v. People*, 1 Park. Cr. Rep., 246; *State v. Pybuss*, 4 Humph., 442; 16 Mass., 423; 12 Wis., 538.

ACCOMPLICE.

This term is more general in meaning than accessory, including all persons who have been concerned in the commission of a crime, all *particeps criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. Fost. Cr. Law, 341; 1 Russ., 21; 4 Bl. Com., 331; 1 Phil. Ev., 28. As already seen by Sec. 4314, there is no distinction made in our state between principals or accessories, so that an indictment against an accessory will be the same as against the principal, which will be found in its appropriate place under each crime.

EVIDENCE—CORROBORATION.

A conviction cannot be had on the testimony of an accomplice, unless corroborated by such other evidence as in itself tends to connect the defendant with the commission of the offense. Sec. 4102, Rev., 1860; Code 1873, Sec. 4559; *Ray v. State*, 1 G. Gr., 316; *Com. v. Bosworth*, 22 Pick., 399; *Upton v. State*, 5 Iowa, 466; *State v. Willis*, 9 Iowa, 582; *State v. Pepper*, 11 Iowa, 347; *State v. Moran*, 34 Iowa, 454; *State v. Clemens*, 38 Iowa, 257; *State v. Schlagel*, 19 Iowa, 169; 1 Gr. Cr. Rep., 749; *State v. Kellerman*, 14 Kan., 135.

CORROBORATING CIRCUMSTANCES—INSUFFICIENT, WHEN.

Aside from the positive evidence of the accomplice against the defendant, the corroborating evidence being one defendant saying to his co-defendant while being conducted by the officer to jail, that the accomplice with whom they had conversed previous to being committed had told "a pretty straight story," and the other defendant "gave him a hunch." These circumstances are not considered sufficiently corroborating to sustain a conviction. *State v. Moran*, 34 Iowa, 453. Corroborating evidence to be sufficient must not merely relate to the commission of the offense or the circumstances thereof, but must be evidence of a character that shall tend to connect the defendant with the commission of the alleged crime. *State v. Thornton*, 26 Iowa, 80. An accomplice cannot be corroborated in his testimony against the defendant, by the failure of the latter to introduce the testimony of witnesses present at the trial, who, if the testimony of the accomplice had been false, might have contradicted him. *State v. Hull*, 26 Iowa, 292. Whatsoever will make a man an accessory before the fact in felony, will make him a principal in treason, petit larceny and misdemeanors. *State v. Lynburn*, 1 Brevard, 397.

PRESENCE WITHOUT ASSISTANCE INSUFFICIENT TO CONVICT.

Though a person may be present when a felony is committed, if he take no part in it, he will not be a principal merely because he did not endeavor to prevent the commission of the crime or apprehend the criminal. 1 Hale, P. C., 615, 616; Wharton's Cr. Law, Chap. 3; *State v. Farr*, 33 Iowa, 561; *Counaughty v. State*, 1 Wis., 159.

RECEIVING STOLEN GOODS—NOT ACCOMPLICE, WHEN.

The receiving of stolen goods does not make the receiver an accomplice in breaking and entering a building with the guilty intent of committing a larceny. *State v. Hayden*, 45 Iowa, 11.

DETECTIVE AS ACCOMPLICE.

A detective, who enters into communication with criminals, without any felonious intent, but for the purpose of discovering and making known their secret designs, crimes and acts throughout, with this original purpose, is not to be regarded as an accomplice. The question whether he was so acting is one of fact for the jury. *State v. McKean*, 36 Iowa, 343; *Ree v. Despard*, 28 Howell's St. Trials, 346; 43 Geo., 3; *Commonwealth v. Downing*, 4 Gray, 29; *Ib. v. Willard*, 27 Pick., 476.

AN ACCOMPLICE CANNOT CORROBORATE ANOTHER ACCOMPLICE.

The testimony of one accomplice is not sufficient to corroborate the testimony of another accomplice, and a defendant should not be convicted on the testimony of two accomplices unless corroborated by some other testimony. *Ray v. State*, 1 G. Gr., 306; *Johnson v. State*, 4 G. Gr., 65.

CO-DEFENDANT AS AN ACCOMPLICE.

The fact that one is jointly indicted with another, does not make him an accomplice, unless he is so in fact. *State v. Schlagel*, 19 Iowa, 169.

EVIDENCE—CREDIBILITY.

When an accomplice testifies in a criminal cause and is corroborated by other witnesses, in any material point, then his testimony when so corroborated is sufficient to convict. *State v. Schlagel*, 19 Iowa, 169; *King v. Dawbar*, 3 Starkie, 34.

In Indiana it is held that the want of an averment in an indictment, that the principal had been convicted, was no ground for arresting the judgment; and *second*, that an accessory must be tried after the conviction of the principal, or be tried with him; *third*, that if the record does not show other than that the principal had been convicted before trial of an accessory, there is no ground for the latter to object in an appellate court that there had been no such conviction. *Harty*

v. State, 3 Blackf., 386. And accomplices are competent witnesses even when jointly indicted, if separately tried. *Everett v. State*, 6 Ind., 495; *Watson v. State*, 7 Ind., 159, and upon whose testimony alone the jury may find a verdict of guilty. *Johnson v. State*, 2 Ind., 652; *Dawley v. State*, 4 Ind., 128; *Stocking v. State*, 7 Ind., 326; *Rex v. Stubbs*, 33 Eng. Law & Eq. Rep., 551; 1 Lead. Crim. Cases, 545.

ACCESSORY MISDEMEANORS.

In cases of misdemeanors there are no accessories known to the law. *Wilson v. State*, 1 Wis., 184; *State v. Kellerman*, 14 Kan., 135; *Ward v. People*, 3 Hill, 395; 6 Hill, 144.

GUILT OF PRINCIPAL.

In order to convict a person indicted as accessory before the fact to a felony, the prosecution must prove, by competent evidence, the guilt of the principal felon, as charged in the indictment, as well as that of the defendant. *Ogden v. State*, 12 Wis., 532.

EVIDENCE—WRITTEN STATEMENTS OF DEAD ACCOMPLICE.

A written confession or deposition may be introduced in evidence of a dead accomplice. 1 Leach Cr. Cases, 12; 2 Strange, 1137; 2 Lead. Cr. Cases, 454.

PRINCIPAL—ACCESSORY.

Where a principal totally and substantially departs from the instructions of an accessory and commits a different offense, or an additional offense, he stands single in such different and additional offense, and the other is not held responsible for it as accessory. *Watts v. State*, 5 W. Virginia R., 532; 2 Gr. Cr. Rep., 676. Or where an accessory to the crime of an assault and battery with intent to murder is tried before the principal, and a verdict of guilty is rendered against him, but before judgment the principal is acquitted, the accessory on production of the record showing the acquittal of the alleged principal is entitled to be discharged. *McCarty v. State*, 44 Ind., 214; 2 Gr. Cr. Rep., 715. See generally *State v. Rand*, 33 N. H., 216; *Hately v. State*, 15 Georgia, 346; *McCarty v. State*, 26 Miss., 299; *Brennan v. People*, 15 Ill., 511.

ACCOMPLICES.

All who confederate together for the commission of a felony and are present aiding and assisting in its perpetration are, in law, equally guilty. *Carrington v. People*, 6 Park. Cr. Rep., 336; *Doan v. State*, 26 Ind., 495; *State v. Squares*, 2 Nev., 226; *Com. v. Chapman*, 11 Cush., 422; *Pritchard v. State*, 30 Ga., 757; *Boggus v. State*, 34 Ga., 275.

TRIAL, PLACE OF AND TIME.

An accessory may be indicted and tried in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county. *Baron v. People*, 1 Park. Cr. Rep., 246; *Adams v. People*, 1 Conn., 173.

KANSAS LAW.

Under the Kansas statutes an accessory before the fact may be charged as principal, and may be tried and convicted as though he were the principal, and this is not in conflict with the provisions of Sec. 10, Bill of Rights. *State v. Cassidy*, 12 Kan. 550.

MANSLAUGHTER.

There can be no accessories before the fact in cases of manslaughter. 1 Hale, 616.

ACCOMPLICE—SELF CRIMINATION—CROSS EXAMINATION.

An accomplice who has given testimony criminating himself as well as his co-defendant, on whose trial he testifies, cannot refuse to answer fully on cross examination concerning the entire transaction of which he has undertaken to give an account, and in which he had shown himself guilty. *Foster v. People*, 8 Am. Law Register, 494.

ACCEPTANCE OF BRIBES BY OFFICERS.

SECTION 3940. If any executive or judicial officer, or member of the general assembly, accept any valuable consideration, gratuity, service or benefit whatever, or any promise to make the same or to do any act beneficial to such officer or member under the agreement or with the understanding that his vote, opinion, decision or judgment shall be given in any particular manner or upon any particular side of any question, cause, or other proceeding which is, or may by law be, brought before

him in his official capacity, or that in such capacity he will make any particular nomination or appointment, he shall be imprisoned in the penitentiary not more than ten years, or be fined not more than two thousand dollars and imprisoned in the county jail not more than one year.

SEC. 3941. Every person who is convicted under either of the two preceding sections of this chapter shall forever afterward be disqualified from holding any office under the laws or constitution of this state. [Limitation by Sec. 4167, three years.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA
VS.

The grand jury of the county of Linn, in the name and by the authority of the State of Iowa, find that the said . . . in said county and state, on the . . . day of . . . , 187 . . . did commit the crime of knowingly receiving a bribe, as follows: The said A B was then and there a judge of the Circuit Court for the "Eighth Judicial District of Iowa," having been duly sworn to discharge the duties of said office, and that there was then and there pending before the said A B, as such judge, in said Circuit Court, in and for Linn county, Iowa, a certain action, cause and proceeding of which the said Circuit Court then and there had jurisdiction, wherein one C D was plaintiff and one E F was defendant, and in which said action the said C D demanded judgment against the said E F for the sum of . . . dollars; and that the said A B, as such judge, well knowing the premises, but intending the duties of his said office to prostitute and betray, did then and there, unlawfully, corruptly, knowingly and feloniously take, accept and receive from the said C D a certain sum of money, to wit, the sum of . . . dollars, as a bribe, gift and reward, under and pursuant to an agreement with the said C D that the opinion, judgment and decision of the said A B, as such judge, in said action, cause and proceeding, so pending as aforesaid before him the said A B in his said official capacity, should be given in favor of the said C D and against the said E F, contrary to and in violation of law.

ADULTERY.

SECTION 4008. Every person who commits the crime of adultery shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year; and when the crime is committed between parties only one of whom is married, both are guilty of adultery and shall be punished accordingly. No prosecution for adultery can be commenced but on the complaint of the husband or wife. [Limitation by Sec. 4166, eighteen months.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA
VS.

The grand jury of the county of Linn, in the name and by the authority of the State of Iowa, find that said defendant in said county and state, on the . . . day of 187 . . . did commit the crime of adultery, by then and there having carnal knowledge of one . . . she being at the time a married woman, to-wit, the wife of . . . and the said defendant being at the time a married man, having a lawful wife living, to-wit, . . . and then and there having committed said acts contrary to and in violation of law.

INDICTMENT.

Where the prosecution is commenced before a magistrate, and the prosecuting witness fails to appear before the grand jury, it would be well to further aver in the indictment, that on the..day of1878, L A still being the wife of the said defendant....., did commence this prosecution by filing in the office of.....a justice of the peace of Linn county, Iowa, her information under oath charging said defendant with said crime. That in the further progress of said prosecution, said.....on the..day of.....187..was by said justice held to answer said charge at the next term of the District Court of said county.

MUST BE COMMENCED BY HUSBAND OR WIFE.

This prosecution must be commenced by the husband or wife; but where the same is commenced before a justice by either, it is deemed a sufficient commencement, and does not necessarily have to be continued by such husband or wife. Nor does it necessarily follow that the husband or wife must appear as a witness on trial after appearing before the grand jury. *State v Dingee*, 17 Iowa, 232.

JOINT AND SEPARATE INDICTMENT.

Parties may be either jointly or separately indicted. The better practice is to indict them separately. *State v Dingee*, 17 Iowa, 232; *State v. Parham*, 5 Jones, 416; *State v. Bartlett*, 53 Maine, 446; *State v Cox*, 2 Tayl., 165.

NON-EXISTENCE OF MARRIAGE.

The indictment must allege that the woman with whom the crime is charged to have been committed was not the wife of the accused. *Moore v. Com.*, 6 Met., 243.

PARTIES DEFENDANTS.

An unmarried person may be indicted and convicted of adultery upon the complaint of the husband or wife of the person with whom the act was committed. *State v. Wilson*, 22 Iowa, 366.

DISMISSAL OF PROSECUTION.

Where two are jointly indicted, the husband or wife prosecuting may show that he or she does not desire to further

prosecute, and on motion, such husband or wife indicted should be discharged. *State v. Roth*, 17 Iowa, 336.

EVIDENCE—OTHER ACTS OF ADULTERY.

Evidence of acts of adultery between the defendant and the same woman, near the time of the adultery for which he was indicted, though committed in another place is admissible on the trial. *Com. v. Nichols*, 114 Mass., 285; 19 Am. R. 346. When a single act is charged in one count, acts committed at another time are not admissible. *Com. v. Bates*, 10 Conn., 372; *State v. Walters*, 45 Iowa, 389.

HUSBAND AND WIFE WITNESSES.

Sec. 3983, Rev. 1860, which is the same as Sec. 3641, Code of 1873: "The husband or wife shall in no case be a witness for or against the other, except in a criminal proceeding for a crime committed by one against the other." Is the adultery of the wife in such sense a crime committed against the husband, as to render him, under this section, a competent witness against her, in a criminal prosecution for the offense? *Held* that the husband is a competent witness for the state, and not disqualified. *State v. Bennett*, 31 Iowa, 24. So the wife is a competent witness for the state as against the husband. *State v. Hazen*, 39 Iowa, 648, while the contrary was held in *Com. v. Sparks*, 7 Allen, 534; *State v. Welch*, 26 Maine, 30; *Miner v. People*, 58 Ill., 59; 1 Green's Cr. R., 655.

PROOF OF MARRIAGE.

Record evidence is not indispensable to prove the marriage. The fact may be established by either the husband or wife, and by proof of long and continued cohabitation. *State v. Wilson*, 22 Iowa, 364; *State v. Hazen*, 39 Iowa, 648; *State v. Dudley*, 7 Wis., 664; *State v. Clark*, 54 N. H., 456; 1 Am. Cr. R., 34. So by those present at the marriage is sufficient. *Com. v. Narcross*, 9 Mass., 492; or by the defendant's admission. *Cook v. State*, 11 Ga., 53; *State v. McDonald*, 35 Mo., 176; *State v. Sanders*, 30 Iowa, 582; *State v. Libbey*, 44 Maine, 469; *State v. Medbury*, 8 R. I., 543; *Wolverton v. State*, 16 Ohio, 173; *Cameron v. State*, 14 Ala., 546. It is not necessary to produce the license, or to show that the per-

son officiating was authorized to solemnize the marriage. *Murphy v. State*, 50 Ga., 150.

CONSENT OF CO-DEFENDANT—EFFECT OF.

To constitute the crime of adultery as against the *man* the consent of the woman to the carnal intercourse is not indispensable; the offense may exist though the connection was effected by force, and may be rape. *State v. Sanders*, 30 Iowa, 582.

ACCOMPLICE.

As to whether the co-defendant to the act may be regarded as an accomplice, there are grave doubts; but even when her testimony is regarded as that of such, if corroborated by other facts and circumstances, it is sufficient to convict. *State v. Sanders*, 30 Iowa, 586; *State v. Briggs*, 9 R. I., 361; 11 Am. R., 270.

PROOF OF ACTUAL MARRIAGE.

While it is held in other states that there must be proof of actual marriage, reputation and cohabitation is not sufficient. *Miner v. People*, 58 Ill., 59; 1 Green's Cr. R., 655; *State v. Rood*, 12 Vt., 296.

ACTS OF FAMILIARITY.

Evidence of acts of familiarity of the parties prior to the time relied on by the prosecution is admissible, as tending to show a guilty intent. *Com. v. Pierce*, 11 Gray 447; *Com. v. Durfee*, 100 Mass., 146; *Com. v. Lahey*, 14 Gray, 91; *State v. Wallace*, 2 N. H., 515.

CONFESSION OF CO-DEFENDANT.

On trial of a joint indictment the confession of one party is not admissible in evidence against the other. *Frost v. Com.*, 9 Mon., 362. So the admission of the woman in her paramour's absence that she was the wife of another is not admissible in evidence against the man. *Com. v. Thompson*, 99 Mass., 444.

NEIGHBORHOOD TALK.

Evidence of rumor and neighborhood talk that adultery openly and notoriously existed. *Belcher v. State*, 8 Humph., 63.

INTENT IGNORANCE JUSTIFICATION.

Evidence that the defendant acted in good faith under advice of a justice, and honestly thought they were committing no offense is not admissible ignorance of law, is no excuse. *State v. Goodenow*, 65 Me., 30; 1 Am. Cr. R., 42; *Cutter v. State*, 36 N. J., 125; *United States v. Anthoney*, 11 Blachf., 200; *Ib.*, 374; *Black v. Ward*, 27 Mich., 191; 15 Am. Law Register, 162; *Com. v. Elwell*, 2 Met., 190; *Com. v. Farren*, 9 Allen, 489; *Com. v. Goodman*, 97 Mass., 117; *Com. v. Emmons*, 98 Mass., 6.

DEFENSE MARRIAGE PROHIBITED.

Under the laws of North Carolina, marriages between negroes and white persons were unlawful. A white woman left the state in order to be married in another state to a negro resident thereof, and not intending to return. She was so married, and afterward did return with her husband. It was held that the marriage was valid in North Carolina. *State v. Ross*, 76 N. C., 242; 22 Am. R., 678; while parties under like circumstances left the state for the purpose of avoiding the law, and with *intent to return*, and were married in another state, where such marriages between a white person and a negro was lawful, it was held that the marriage in North Carolina was not valid. *State v. Kennedy*, 76 N. C., 251; 22 Am. R., 683.

AFFRAYS.

SECTION 4065. If two or more persons voluntarily or by agreement engage in any fight, or use any blows or violence towards each other in an angry or quarrelsome manner, in any public place to the disturbance of others, they are guilty of an affray, and shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars. [Limitation, Sec. 4168, one year.]

For jurisdiction of justices, see title, "Proceedings and Trials before justices of the peace."

Form of Information.

THE STATE OF IOWA }
VS. } Before . . . a justice of the peace of . . . county, Iowa.
Information.

The defendants are accused of the crime of an affray. For that said defendants on or about the . . . day of . . . 1878, in the town of Viola, township of Brown, Linn county, Iowa, did willfully and unlawfully, voluntarily and by agreement, engage in fighting (or using blows and violence towards each other in an angry and quarrelsome manner) in a public place, to-wit: the public square in said town of . . . , in said county, to the disturbance of others, contrary and in violation of law.

INDICTMENT—INFORMATION.

An indictment charging the affray to have taken place in a public place is good without further describing the location. *Wilson v. State*, 3 Hirsck., Tenn., 278; 1 Green's Cr. R., 550.

MUST STATE WHAT WAS DONE.

An indictment which merely alleges that the defendants made an affray without specifying what was done, is insufficient. *State v. Woody*, 2 Jones, 335. So, an information for an affray which alleged that the defendants fought in a public place, but did not state whom or what they fought was held bad. *State v. Vanloan*, 8 Ind., 182. But an indictment which charged that two persons, with force and arms, did make an affray by fighting, was held sufficient. *State v. Benthall*, 5 Humph., 519; *State v. Vridely*, 4 Id., 429.

AVERMENT OF PLACE, WHEN INSUFFICIENT.

To allege in an indictment that the fighting was in the town of Clarksville, is insufficient. *State v. Heflin*, 8 Humph., 84.

ELEMENTS.

An affray is a fighting by mutual consent by two or more persons, in some public place, to the terror of the people. *Simpson v. State*, 5 Yerg., 356; *Duncan v. Com.*, 6 Dana, 295. Consent is not essential. *Cash v. State*, 2 Overt, 198; *Klum v. State*, 1 Blackf., 377; and a person who aids, assists and abets an affray is guilty as principal. *Hawkins v. State*, 13 Ga., 322; *State v. Lanier*, 71 N. C., 288; 2 Green's Cr. R., 753. Words, drawing of knives and an attempt to use them is an affray in a public street. 13 Ga., 322. Abusive language by one to induce another to strike him is an affray. *State v. Perry*, 5 Jones, 9; *State v. Sumner*, 5 Strobb., 53; *O'Niel v. State*, 16 Ala., 65.

PRIZE FIGHTING.

Where two persons by mutual agreement engage in a fight with each other, each is guilty, although there is no anger or ill will, and the mutual consent is no bar or defense; and it is immaterial as to who struck first. It can only go in mitigation of damages in a civil suit, the doing of these acts being unlawful, cannot be set up as a defense or bar, for the reason that it

was mutual. *Com. v. Collberry*, 119 Mass., 350; 20 Am. R., 328; *Adams v. Wagner*, 33 Ind., 531; 5 Am. R., 231.

VERDICT.

On trial of several for an affray, one or more may be acquitted and the rest convicted. *Cash v. State*, 2 Overt., 198. But where two persons are on trial for an affray, the successful defense of one, will have the effect of acquitting the other. *Harokins v. State*, 13 Ga., 322.

ASSAULT AND BATTERY.

Although every affray includes an assault, yet a charge of an affray will not justify the jury in convicting the prisoners of an assault or battery. *Childs v. State*, 15 Ark., 204. While in Virginia under a charge of an affray the defendants were acquitted of the affray, it was held that they could be convicted of an assault and battery by one upon the other. *Com. v. Perdue*, 2 Va. Cases, 227; *contra*, *State v. Allen*, 4 Hawks., 356.

ALTERING BRANDS, STAMPS AND MARKS.

SECTION 4078. If any person falsely alter any stamp, brand, or mark on any cask, package, box, or bale, containing merchandise or produce, made by a public officer appointed for that purpose, in order to denote the quality, weight, or quantity of the contents thereof, with intent to defraud, he shall be fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year. [Limitation, Sec. 4167, three years.]

Form of Indictment.

District Court of the County of

THE STATE OF IOWA	}	Altering Brands.
vs.		

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of altering brands, committed as follows: The said A B then and there being a grocer, and then and there having in his possession, control, and for sale as such grocer, certain casks of molasses, marked, made and manufactured by A, J & Co., said casks being branded as containing ten gallons, and that said A B at . . . on . . . knowingly, willfully, and unlawfully, and with intent to defraud, did alter and change said brands denoting the number of gallons which said casks contained, by then and there erasing the word "ten" and inserting in its place the word "twelve," contrary, etc.

APPROPRIATING MONEY IN EXCESS OF THE
AMOUNT APPROPRIATED FOR CER-
TAIN PURPOSES PROHIBITED.

LAWS 1878, CHAPTER 67.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. It shall be unlawful for any trustee, superintendent, warden, or other officer of any of the educational, penal, or charitable institutions of this state, to contract any indebtedness against said institution, or the state, in excess of the appropriation made for said institution: *Provided*, that nothing herein contained shall prevent the incurring of an indebtedness on account of support funds for state institutions upon prior written direction of the executive counsel, specifying the items and amount of such indebtedness to be increased and the necessity therefor.

SEC. 2. It shall be unlawful for any superintendent, warden, trustee or other officer of any of the institutions mentioned in section 1 of this act, to divert any money that has been or may be appropriated for the use of said institutions to any other purpose than the specific purpose named therefor in the act appropriating the same.

SEC. 3. Any person violating any of the provisions of sections 1 and 2 of this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both fine and imprisonment.

SEC. 4. This act, being deemed of immediate importance, shall be in force from and after its publication in the *Iowa State Register* and *Iowa State Leader*, newspapers published in Des Moines, Iowa.

Approved March 21, 1878.

ARSON.

SECTION 3880. If any person willfully or maliciously burn in the night time, the inhabited building, boat, or vessel of another, or willfully and maliciously set fire to any other building, boat or vessel owned by himself or another, by the burning whereof such inhabited building, boat, or vessel is burnt in the night time, he shall be punished by imprisonment in the penitentiary for life or any term of years.

SEC. 3881. If any person willfully or maliciously burn in the day time the inhabited building, boat, or vessel of another, or any building, boat, or vessel adjoining thereto; or willfully

and maliciously set fire to any building, boat or vessel owned by himself or another, by the burning whereof such inhabited building, boat, or vessel is burnt in the day time; or in the day time willfully and maliciously set fire to any building, boat, or vessel owned by himself or another, by the burning of which any such inhabited building, boat, or vessel is burnt in the night time, he shall be punished by imprisonment in the penitentiary for a term not exceeding thirty years.

SEC. 3882. If any person willfully and maliciously burn in the night time, any uninhabited dwelling house, boat, or vessel belonging to another, or any court house, jail, college, church, or any building erected for public use; or any other building, boat, or vessel, by the burning whereof any building, boat, or vessel mentioned in this section is burnt in the night time, he shall be punished by imprisonment in the penitentiary not exceeding twenty years.

SEC. 3883. If any person willfully and maliciously burn in the day time any building, boat, or vessel mentioned in the preceding section, he shall be punished by imprisonment in the penitentiary not exceeding fifteen years.

SEC. 3884. If any person willfully and maliciously burn, either in the night or day time, any warehouse, store, manufactory, mill, railroad depot, barn, stable, shop, office, out-house, or any building whatsoever of another, other than is mentioned in the preceding sections of this chapter, or any bridge, lock, dam, or flume, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

SEC. 3885. If any person set fire to any building, boat, or vessel mentioned in the preceding sections of this chapter, or to any material with intent to cause any such building, boat, or vessel to be burnt, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding one thousand dollar and imprisonment in the county jail not more than one year.

SEC. 3888. If any person willfully burn any building, goods, wares, merchandize, or other chattels which are insured against loss or damage by fire, or willfully cause or procure the same to be burned, with intent to injure the insurer, whether such person be the owner of such property or not, he shall be punished by imprisonment in the penitentiary not exceeding ten years. [Limitation, Sec. 4167.]

Form of Indictment, under Section 3880.

District Court of the County of

THE STATE OF IOWA }
vs. } Arson.

The grand jury of the county of . . . in the name and by the authority of the State

of Iowa, accuse . . . of the crime of arson, committed as follows: Said defendant . . . on the night of the . . . day of . . . 1878, in . . . county, Iowa, did feloniously and willfully set fire to, burn and consume, a certain two story frame dwelling house then and there situated and being the property of . . . (or did unlawfully, feloniously, willfully and maliciously set fire to one one story frame house owned by the said defendant, by the burning of which a two story frame dwelling house was in the night time of said day of . . . 1878, burned and consumed, being then and there the property of . . .) contrary, etc.

The same form will answer for Sec. 3881, except as to the character of the building and the time of the commission of the offense. Under Sec. 3882, the indictment may be in this form:

. . . did willfully and maliciously set fire to and burn in the night time, on the said . . . day of . . . 1878, a certain one story frame dwelling house, then and there situated and uninhabited at the time, belonging to another, to-wit: . . . by the burning of which a certain two story frame dwelling house, then and there situated in said county and state, the property of one . . . was burned and consumed (or insert "out-house, church, boat, or vessel," as the case may be).

The same will apply for sections 3883 and 3884. Under Sec. 3885, the following may be used:

. . . did feloniously, unlawfully and willfully set fire to a certain one story frame building used for a shoe shop and occupied by one . . . situated on lot 4, block 4, Marion, Iowa, owned by one . . . and of the value of . . . with intent then and there, feloniously and willfully, to cause the said shoe shop of said . . . to be burned and consumed (or did feloniously and willfully set fire to a great amount of shavings and rubbish in said building, with intent then and there to feloniously burn said building), contrary, etc.

To defraud an insurance company:

. . . did willfully and maliciously set fire to, with the intent to burn and consume a certain one story frame building used and occupied by himself as a store room, being and situated on lot . . . block . . . Marion, Iowa, and at the time owned by said defendant; the said building at the time then and there being insured in a fire insurance company, as against any loss or damage by fire, in the sum of one thousand dollars, in a company known as the Aetna Fire Insurance Company, with intent to procure the insurance on the same (or, if the goods and merchandize were insured, so state, with the same intent; or did, as first alleged, cause or procure the same to be burned with intent to injure the insured).

The form as given in the two last above is approved in *State v. Tennery*, 9 Iowa, 436; *State v. Johnson*, 19 Iowa, 231.

INDICTMENT—VARIANCE, CHARGE AND PROOF.

Where the indictment charges that the fire was set out in a store room of A, and proof that the fire was set out in the store room of B, it is fatal; though B is but a tenant of A. *State v. Tennery*, 9 Iowa, 437.

INTENT, ACTUAL BURNING.

Where the indictment charges that the fire was set out "with intent to burn, etc.," it is not necessary that the building should have actually burned, or that the material ignited; the intent being the essence of the crime. *State v. Johnson*, 19 Iowa, 232; 1 Bishop Cr. Law, Sec. 576; *People v Cotterill*, 18 Johnson, N. Y., 115.

DESCRIPTION OF BUILDINGS.

At common law to burn a barn would not be arson unless it had in it hay or grain; this rule is changed and the burning is arson without reference to its contents. 3 Whart. Cr. Law, 427; 3 Chitty Cr. Law, 868; 1 Bishop Cr. Law, 306; *State v. Smith*, 28 Iowa, 565. And the question as to whether the building is a barn, shed or stable, should be left to the jury. *State v. Smith*, 28 Iowa, 565. In Maine, it is provided that for the burning of any building, it is sufficient to allege the setting fire to "a building." *State v. Taylor*, 45 Maine, 322. So, to allege "setting fire to, and the same house then and there by the spreading of such fire feloniously burning," was held sufficient. *Palston v. State*, 14 Mo., 463. Under the New Hampshire statute where the indictment alleges that the defendant burned a building called a barn, it need not state whether or not a dwelling house was also burned. *State v. Emerson*, 53 N. H., 619; 2 Green's Crim. R., 362. An indictment which alleges that the defendant did maliciously, etc., set fire to and burn a house used as a dwelling house, in the night time, the property of, sufficiently shows that the house burned is a dwelling house. *McLans v. State*, 4 Ga., 335. Under the Massachusetts statute, to describe the building burned as not then completed, was held sufficient; the question whether it was such a structure as to constitute it a building is a question of fact for the jury. *Com. v. Squire*, 1 Metc., 258. In New York it is sufficient to describe a building which has been usually occupied by persons lodging therein at night as a "dwelling house," although it may not be a dwelling house. *People v. Orcutt*, 1 Parker Cr. R., 252. So, where the second floor of a building was occupied by the prisoner and the residue by a tenant who habitually lodged therein, it was held proper to describe it in the indictment as a dwelling house of the tenant. *Shepherd v. People*, 19 N. Y., 537. An indictment which charges that the defendant did willfully and maliciously set fire to and burn a certain building called a saloon, was held bad in not showing for what purpose the building was occupied. *State v. O'Connell*, 26 Indiana, 266.

OWNERSHIP OF PROPERTY.

Where the building was occupied by a tenant and the indict-

ment charges the burning of a dwelling, the name of the one occupying the dwelling should be given and not the owner of the premises. *People v. Gates*, 15 Wendell, 158; *Snyder v. People*, 26 Mich., 106; 12 Am. R., 302; *State v. Tennery*, 9 Iowa, 437. Under the common law the indictment must allege correctly the name of the owner. *McGary v. People*, 45 N. Y., 153; 2 Lansing, 227; *Martha v. State*, 26 Ala., 72; *Martin v. State*, 28 Ala., 71. Where the indictment charged the burning of a certain dwelling house which was the property of one A, and the dwelling house of one B, it was held bad, it being uncertain whether the building burned was the property A or B. *People v. Myers*, 20 Cal., 76. Burning of a public building need not be alleged as belonging to any one. *State v. Roe*, 12 Vt., 93.

DUPLICITY, CHARGING TWO OFFENSES.

An indictment for arson charging as a single act the burning of several houses, is charging but one offense, and therefore not bad for duplicity. *Woodford v. People*, 62 N. Y., 117; 20 Am. R., 464; 20 Conn., 232; *Rowls v. Lusty*, 4 Bing., 428; *Regina v. Trueman*, 8 Car. & P., 727. An indictment for arson, each count of which charges the offense in the first degree, but alleges a different house and different ownership, is not bad on demurrer. *Miller v. State*, 45 Ala., 24. So an indictment which alleges that the defendant set fire to, on a certain day, and burned a stack of hay, and also a building used as a stable and granary, is bad for duplicity. *State v. Fidment*, 35 Iowa, 541.

ATTEMPT TO BURN.

An indictment charging an attempt to burn need not allege the manner and means of the attempt. 4 Hill, 133. Nor that it was willfully done. 55 Barb., 450; 38 Howard's Pr., 369. Nor need it to describe the combustibles alleged to have been used by the defendant. *Conn. v. Flynn*, 3 Cush., 529.

TO DEFRAUD INSURANCE COMPANIES.

An indictment for committing arson with intent to defraud an insurance company must allege that the building was insured, and as to whether the policy was valid or not is immaterial. *People v. Henderson*, 1 Park. Cr. R., 560; 47 Ill.,

533. But need not allege in what manner the attempt was made. *Macksey v. People*, 6 Park. Cr. R., 114. But an information under a statute which punishes the setting fire to a building, or to any other material with intent to cause such building to be burned, is not sufficient which merely alleges that the defendant solicited a person to burn the building, although it also alleges that the defendant furnished such person with combustibles for the purpose. *McDate v. People*, 29 Mich., 50. An indictment for burning a building insured against loss by fire, with intent to defraud an insurance company, must allege that the company is incorporated. *People v. Schwarz*, 32, Cal., 160. While in New York an indictment for setting fire to a shop with intent to burn the prisoner's goods therein, which were insured, it was held good without alleging that the company was a corporation, or had the right to insure the goods of the prisoner. *Macksey v. People*, 6 Park., 114. The intent to defraud the company must be alleged. *People v. Henderson*, 1 Park. Cr. R., 560; *Martin v. State*, 29 Ala., 30.

DESTRUCTION OF SEVERAL BUILDINGS.

Where the consequence of a single act is the destruction by fire of thirty-five dwelling houses the prisoner may be indicted as for one offense, and the indictment need but contain one count, regarding the entire fire as one transaction. *Woodford v. People*, 5 N. Y., 539.

PLACE VENUE.

An indictment for burning a barn and outhouse, "at A in the county of B" is sufficient without the words "there situated." *Com. v. Lamb*, 1 Gray, 493.

ELEMENTS.

It is not necessary that the building should be entirely consumed. *People v. Butler*, 16 Johns, 203.

OCCUPANCY—HUSBAND AND WIFE.

A husband jointly occupying a house with his wife, cannot be convicted of arson though it may be her separate property. *Snyder v. People*, 26 Mich., 106; 12 Am. R., 302.

PRISONER SETTING FIRE TO PRISON.

The setting fire to a prison merely for the purpose of escape, and without the intent to burn the prison is not arson. *People v. Cotterell*, 18 Johnson, 115; *Delaney v. State*, 41 Texas, 601; 1 Am. Cr. R., 86.

ADJOINING BUILDINGS.

Where one sets fire to a building from which the fire spreads to another and adjoining building, a conviction can be maintained for burning the adjoining building, 21 Howard Pr., 239.

BURNING ONE'S OWN HOUSE.

Setting fire to one's own house in a city, the house being occupied by himself and other tenants, is a great misdemeanor. *Ball's Case*, 5 City Hall Rec., 851. It is not a crime at common law for a man to destroy his own property by fire, unless it be accompanied by an injury to, or by a design to injure, some other person. *Bloss v. Toby*, 2 Pick., 325.

ACCESSORY.

One who gives matches to another, hiring him to set fire to the property of the former, which is insured, is guilty of setting fire with intent to commit arson. 4 Hill., 133. Contrary, *McDade v. People*, 29 Mich., 50; 1 Am. Cr. R., 81.

EVIDENCE—OWNERSHIP—PRESUMPTION.

Upon an allegation of ownership of a dwelling house, the legal presumption is that the person named as owner is in possession. *Woodford v. People*, 62 N. Y., 117; 20 Am. R., 464.

CIRCUMSTANTIAL.

To justify a conviction on circumstantial evidence, it is necessary not only that the circumstances should all concur to show that he committed the crime, but that they all be consistent with any other rational conclusion. *State v. Johnson*, 19 Iowa, 230. The evidence in this particular case is fully discussed. So in *State v. Moffitt*, 31 Iowa, 316.

PROPERTY BURNED.

When the building alleged to be burned is called a barn, it may be proved that it was thus called and designated although

it was used for a purpose other than that indicated by its name. *State v. Smith*, 28 Iowa, 565.

STACKS—SHOCKS.

The burning of a stack of wheat is not sustained by evidence of the burning of shocks of wheat. *Denbow v. State*, 18 Ohio, 11.

OWNERSHIP.

The ownership is material and must be proved as laid. *Carter v. State*, 20 Wis., 647; *Com. v. Wade*, 17 Pick., 395. So that it is in the actual occupation of the person named is evidence of ownership. *State v. Taylor*, 45 Maine, 322.

MOTIVE.

Evidence that the property was insured is admissible to show a motive on part of the prisoner. *Didien v. People*, 4 Parker Cr. R., 593; *Frenud v. People*, 5 Park. Cr. R., 198. Also that the prisoner lived unhappily with his wife who was burned with the building. *Shepherd v. People*, 19 N.Y., 537.

DEFRAUD INSURANCE COMPANY.

Where the charge is that the defendant burned or set fire to a building with intent to defraud an insurance company, the existence of the corporation need not be proved by its charter, nor a compliance with any state law. *People v. Hughes*, 29 Cal., 257.

THREATS.

Threats of revenge made by the defendant on account of an arrest caused by the owner of the barn burned, and uttered from one to two years previously, was held admissible. *Com. v. Goodwin*, 14 Gray, 55.

ASSAULT AND BATTERY.

SECTION 3878. Whoever is convicted of an assault or an assault and battery, where no other punishment is prescribed, shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars. [Limitation, by section 4168, one year.]

Form of Information.

THE STATE OF IOWA
VS.

In justice's court, before . . . of . . . township, . . .
county, Iowa.

Information.

The defendant is accused of the crime of an assault and battery. For that the said

. . . on the . . . day of . . . 187 , in the township of . . . , county of . . . and State of Iowa, did willfully, unlawfully and in an angry and violent manner assault one C D then and there, being by then and there in a violent manner advancing towards the said C D, and attempting to strike and otherwise abuse him contrary, etc. O-, did willfully, maliciously, unlawfully and in a violent and angry manner assault, beat, strike and otherwise ill treat one C D, contrary, etc.

JURISDICTION.

Under existing laws all offenses less than felonies, where the punishment does not exceed thirty days imprisonment or a fine not exceeding one hundred dollars, are within the exclusive jurisdiction of a justice of the peace, and the District Court has only appellate jurisdiction. Bill of Rights, Constitution of Iowa, Article 1, Sec. 11; 5 Iowa, 508; 6 Iowa, 535; 9 Iowa, 402; 21 Iowa, 45; 37 Iowa, 402.

INDICTMENT—INFORMATION.

An information charging an assault and battery, does not charge two offenses. *Benham v. State*, 1 Iowa, 542; *Cokley v. State*, 4 Iowa, 479; *State v. Twogood*, 7 Iowa, 253.

CHARGING PART.

To charge simply "did assault" is not sufficient, but the information should give a statement of the facts. *State v. Murray*, 41 Iowa, 580. The contrary was held in *State v. Douglass*, 1 G. Greene, 550.

To charge "inhumanly whipping and beating, is sufficient to charge an assault and battery. *State v. Bitman*, 13 Iowa, 485.

NAME OF PARTY ASSAULTED.

The name of the person upon whom the offense is committed must always be given (*State v. Bitman*, 13 Iowa, 485); while it was held in *White v. The People*, that the charge may be as an unknown person, and the name may be ascertained on trial. 32 N. Y., 465; 25 N. Y., 380.

VENUE—TOWNSHIP.

The name of the township need not be given, so that it alleges the county and State. *State v. Gibson*, 9^o Iowa, 295.

ELEMENTS.

An assault may be committed without doing any personal injury, such as recklessly shooting into a crowd and wounding some one though not intended. *State v. Myers*, 19 Iowa, 517.

JURISDICTION.

An assault and battery with intent to inflict great bodily harm, is not within the jurisdiction of a justice. *State v. Carpenter*, 23 Iowa, 506.

INTENT.

It is not every threat that constitutes an assault where there is no actual violence. *State v. Malcom*, 8 Iowa, 414.

EVIDENCE—CHARACTER.

In misdemeanors it is not the practice to permit the defendant to show the bad temper and disposition of the prosecuting witness. *Stevens v. State*, 1 Texas Court of Appeals, 592.

JUSTIFICATION.

Words will not justify an assault and battery. 3 E. D. Smith, 518.

DEFENSE.

It is a good defense to show that the acts complained of were in defense of defendant's premises. 6 Barbour, N. Y., 607.

PASSENGERS ON RAILROADS.

Where a passenger refuses to pay his fare and is ejected for that reason, it is not an assault and battery. 5 Am. Law Register, N. S., 143.

SELF-PROCURED ARRESTS.

Self procured arrests and fines are no defenses to a subsequent prosecution. 48 Mo., 70; *State v. Green*, 16 Iowa, 239.

TEACHER AND PUPIL—REASONABLE CHASTISEMENT.

The teacher of a school has the right to reasonably chastise a pupil. This is conceded to be the law for the maintenance of a teachers authority and the enforcement of discipline; and the fact that the pupil was of age does not change the result. The voluntary assuming the position of a pupil justifies the teacher in inflicting a reasonable chastisement. *State v. Mizner*, 45 Iowa, 248; *Sanders v. Seaver*, 32 Vt., 114; *Commonwealth v. Randall*, 4 Gray, 36; *Stevens v. Fasseto*,

27 Maine, 266. To the same effect it is held that a parent may lawfully correct his child. 1 Blackstone, 452; Kent's Commentaries, 203.

PRIZE FIGHTING—BOXING, ETC.

Where two persons, by mutual agreement, engage in a fight with each other, each is guilty of an assault and battery, although there is no anger or ill will. And it is immaterial who strikes first. *Commonwealth v. Collberg*, 119 Mass., 350; 20 Am. R., 328. See, also Foster's Cr. Law, 259, 260; *Mathew v. Ollerton*, Comb., 218; *Boulter v. Clark*, Bull. N. P., 16.

PRESENCE OF DEFENDANT—VERDICT.

It is not essential that the defendant must be present at the time of the rendition of the verdict. *State v. Sheppard*, 10 Iowa, 126.

ASSAULT WITH INTENT TO COMMIT A FELONY.

SECTION 3876. If any person assault another with intent to commit any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year. [Limitation, by section 4167, three years.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA, }
vs. }

The grand jury of the county of Linn, in the name and by the authority of the state of Iowa, accuse . . . of the crime of an assault with intent to commit a felony, to-wit, robbery committed as follows: That A B on . . day of . . at . . in and upon one C D, feloniously, on purpose and of his malice aforethought did make an assault, and with a deadly weapon, to-wit: a stick of wood of the length of two feet, of the thickness of two inches and of the weight of two pounds, him, the said C D, did then, and there feloniously, on purpose, and of his malice aforethought, strike, beat and wound with intent then and there the moneys, goods and chattels of the said C D, from the person and against the will of the said C D then and there feloniously, by force and violence to the person of the said C D, (or, by putting him the said C D in fear of some immediate injury to his person) to rob, steal, take and carry away, contrary, etc,

ASSAULT WITH INTENT TO COMMIT GREAT BODILY INJURY.

SECTION 3875. If any person assault another with intent to inflict a great bodily injury, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars. [Limitation by section 4167, three years.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA, }
vs. }

..... }
The grand jury of the county of Linn, in the name and by the authority of the state of Iowa, accuse . . . of the crime of an assault with intent to commit great bodily injury committed as follows: The said . . . on the . . . day of . . . 187 . . . did with a deadly weapon to-wit, a certain knife the particular description of which is unknown to this grand jury, then and there in the hands of the said J S upon one L M, make an assault with intent then and there unlawfully, and feloniously to cut and stab, and did inflict upon the person of said L M a great bodily injury contrary, etc.

This form is approved by Basset's Cr. Pr. and Pld., and Arch. Cr. Pld. *State v. Seamons*, 1 G. Green, 419; *State v. Carpenter*, 23 Iowa, 506.

An assault may be committed without doing any personal injury. Recklessly shooting into a crowd and wounding some one not intended is criminal. *State v. Myers*, 19 Iowa, 517.

INTENT.

It is not every threat, when there is no actual violence, that constitutes an assault; there must in all cases be the means of carrying the threat into effect. *State v. Malcolm*, 8 Iowa, 414.

SUFFICIENCY OF INDICTMENT.

To charge "did then and there willfully and maliciously strike and beat C D, with intent of doing her a great bodily injury," charges an indictable offense. *State v. Carpenter*, 23 Iowa, 506.

ASSAULT WITH INTENT TO COMMIT MURDER.

SECTION 3872. If any person assault another with intent to commit murder, he shall be punished by imprisonment in the penitentiary not exceeding ten years. [Limitation, by section 4167, three years.]

Form of Indictment.

District Court of the County of Linn

THE STATE OF IOWA, }
VS. }

The grand jury of the county of Linn, in the name and by the authority of, the state of Iowa, accuse . . . of the crime of assault with intent to commit murder, as follows: The said . . . on the . . . day of . . . 187 . . . did then and there with a certain pocket knife, the particular description of which is unknown to this grand jury, being a dangerous, deadly weapon with which the said . . . was then and there armed, feloniously, willfully and unlawfully (in some states and under the common law), "with malice aforethought" did make an assault in, and upon the body of . . . and did then and there, unlawfully and feloniously cut, wound, and stab the said . . . on the left side of his body, with a felonious intent then and there, to kill and murder the said . . . contrary, etc.

This form is approved. *Johnson v. State*, 1 Texas Court of Appeals, 130.

INDICTMENT—MALICE AFORETHOUGHT.

It is not necessary on a charge of an assault with intent to murder, to allege, in the indictment that the assault was made with malice aforethought. *State v. Newberry*, 26 Iowa, 467; *Collier v. State*, 39 Ga., 31. The contrary was held in *State v. Harris*, 34 Mo., 347.

MUST SPECIFY FELONY.

An indictment for an assault with intent to commit a felony must specify the felony (*State v. Hailstock*, 2 Blackf., 257), and set forth the facts. *Trexler v. State*, 19 Ala., 21; *State v. Jordan*, 19 Mo., 212; *Beasley v. State*, 18 Ala., 535, while it is held that where the defendant is charged with a felonious assault with intent to kill, it is sufficient to charge without specifying the particular acts constituting the assault. *People v. English*, 30 Cal., 214; *State v. Robey*, 8 Nev., 312; 1 Green's Cr. R., 674.

WEAPON, DESCRIPTION OF.

Where an assault is made with an ax, pistol or knife, it will be deemed a deadly weapon without an allegation to that effect. *Kruget v. State*, 1 Kansas, 364; *Dollarhide v. U. S.*, Morris (Iowa), 233.

In some of the States it is not necessary to state the instrument or means employed. *Martin v. State*, 40 Texas, 19; *Dittick v. State*, Id., 117; *State v. Seamons*, 1 Iowa, 418; *Harrison v. State*, 2 Cold. (Tenn.), 232.

DUPLICITY—TWO DEFENDANTS.

Where two commit a joint offense, to-wit: an assault with

30. ASSAULT WITH INTENT TO COMMIT MURDER.

intent to kill, the one with a knife and the other with a gun, the indictment charging them jointly is not bad for duplicity. *Shaw v. State*, 18 Ala., 547.

An indictment charging the assault "did then and there stab and cut," does not charge two offenses. *Johnson v. State*, 1 Texas Court of Appeals R., 130.

LOADED GUN.

An indictment need not allege that the gun was loaded, pointed at the witness or discharged. *State v. Shepard*, 10 Iowa, 126.

JURISDICTION—LESSER OFFENSE.

A defendant under a charge of an assault with intent to kill may on trial be convicted of an assault or an assault and battery, and the district court has jurisdiction thereof. *Benham v. State*, 1 Iowa, 542; *Dixon v. State*, 3 Ib., 416; *State v. Shepard*, 10 Ib., 130; *State v. Jarvis*, 21 Ib., 45; 6 Texas, 348; 7 Porter (Ala.), 495; 5 Ohio, 241; 2 Aiken (Vt.), 181; 4 Met. (Mass.), 354; 3 Stark, 62; 13 Ga., 350; 7 Blackf., 233; 10 Humphrey, 52; 40 Ala., 715; 9 Iowa, 363; 8 Eng., 712.

INTENT.

The actual intent to kill must be found, and that under circumstances that would make the killing murder. *Maher v. People*, 10 Mich., 212.

ASSUMPTION OF INTENT.

Assuming the intent to exist, the act performed must have some adaptation to accomplish the particular thing intended; but this adaptation need only be apparent, not perfect. *State v. Mullan*, 45 Ala., 43; 6 Am. R., 691.

ESSENTIAL INGREDIENT.

The intent is an essential ingredient of a correct definition of an assault with intent to murder. *Johnson v. State*, 1 Texas Court of Appeals R., 610; *Anderson v. State*, Ib., 730; *State v. Jarvis*, 21 Iowa, 46.

INTENT INFERRED.

An intent may be inferred from the act, but there is no artificial rule of law which requires or allows a particular intent to be presumed from given facts. Where the undisputed

evidence shows that no intent was in fact entertained there must be the intent to kill the person assaulted. *Barcus v. State*, 49 Miss., 17; 1 Am. Cr. R., 249.

ELEMENTS—ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER.

It was held in the case of *State v. White*, 41 Iowa, 316, that there was no such crime known to the laws of Iowa as an "*Assault with intent to commit manslaughter*." But this same decision in the same case is since overruled, the court held that "an assault with intent to commit manslaughter is necessarily included in an assault with intent to commit murder; one indicted for the last crime may, under Sec. 4466, be convicted of the first." These views are supported by the following cases, which are directly in point upon this question: *State v. Butman*, 42 N. H., 490; *State v. Waters*, 39 Me., 54; *State v. Phinney*, 42 Ib., 384; *State v. Nichols*, 8 Conn., 496; *Beckwith v. People*, 26 Ills., 500; *People v. Kennedy*, 5 Cal., 133; *People v. English*, 30 Ib., 214.

MURDER.

Where a party commits an assault under circumstances which if death had ensued, the crime would have been murder, and where death is not the result it is murder in the second degree. *Sharp v. State*, 19 Ohio, 379.

MALICE INFERRED.

Where the prisoner commences the attack, with a weapon calculated to kill, and inflicts great injury therewith, malice may be inferred. *People v. Vinegar*, 2 Park. Cr. R., 24.

Where the prisoner shot at A, intending to kill him, and accidentally hit B, a *bystander*, held that he was not guilty of an assault with intent to kill B. *Barcus v. State*, 49 Miss., 17.

WEAPON.

Where it appears on the face of the indictment that the assault charged was committed with a deadly weapon, the prisoner may be found guilty of an assault with said deadly weapon. *People v. Lighter*, 49 Cal., 226; 1 Am. Cr. R., 539.

NEED NOT BE WOUNDING.

A person may assault another with intent to kill without striking or wounding. *State v. McClure*, 25 Mo., 338.

INTOXICATION.

Intoxication may render a party incapable of forming or entertaining the intention of committing an assault with intent to murder. *Mooney v. State*, 33 Ala., 419.

CHARACTER OF ASSAULT.

To sustain a conviction the proof must be such that, if death ensued, it would have been murder. *Elliott v. State*, 46 Ga., 159; *Jackson v. State*, 51 Ib., 402; *Meeks v. State*, Ib., 429; *Smith v. State*, 52 Ib., 88; *Read v. Com.*, 22 Gratt. (Va.), 924; *State v. Neal*, 37 Maine, 468.

EVIDENCE—MALICE.

It is proper to show that the defendant, who was in the employ of the complainant, was maliciously and revengefully disposed toward him, and that defendant did his work badly so as to injure the complainant. *People v. Kerrains*, 1 N. Y. Supreme C., 333.

PREVIOUS DIFFICULTY.

The State may show previous difficulties between parties, but not the particulars. *Tarver v. State*, 43 Ala., 354.

DECLARATION OF PARTY ASSAULTED.

It is proper to show the declarations of the assaulted party as made immediately after the encounter, as part of the *res gestæ*, to show the impression on his mind at the time of the attack. *Monday v. State*, 32 Ga., 672.

ON PART OF DEFENDANT.

The declaration of the defendant, on the next day after the occurrence, manifesting animosity towards the person attacked, was held admissible on the question of malice. *Meeks v. State*, 51 Ga., 429.

PRESUMPTION.

Evidence that the defendant was possessed of a knife, and its character and condition, is admissible as tending to show that the injury was inflicted with a knife. *Com. v. Roach*, 108 Mass., 289.

DEFENSES—LOADED GUN.

The fact that the gun with which an assault is made is not

loaded is no defense, unless the same was known to be so to the assaulted person. *State v. Shepard*, 10 Iowa, 130; *Mullan v. State*, 45 Ala., 43; 6 Am. R., 691.

ALIBI.

A defense of an *alibi* raises no presumption of guilt, nor does the failure to prove the same raise any presumption that the prisoner was present. *Toler v. State*, 16 Ohio St., 583.

BURDEN OF PROOF.

The burden of proof that the acts complained of were done in self defense is on the defendant. *Silvus v. State*, 22 Ohio St., 90; *Waver v. State*, 24 Ohio St., 584; see, also, DEFENSES GENERALLY.

ANTECEDENT GRUDGE.

Mere threats will not excuse a deadly assault, when the party assailed had made no attempt or demonstration of a hostile or equivocal character. *People v. Wright*, 45 Cal., 260.

NOLLE PROSEQUI.

Where the prosecuting attorney enters a *nolle prosequi* as to the intent to murder, the defendant may still be convicted of an assault. *Baker v. State*, 12 Ohio St., 214.

VERDICT.

Upon trial where the jury found the defendant guilty of an assault and battery without the felonious intent, *held* that the verdict might be amended by striking out the words, "and battery." *Com. v. Lang*, 10 Gray, 11.

ASSAULT WITH INTENT TO MAIM, ROB, ETC.

SECTION 3874. If any person assault another with intent to maim, rob, steal, or commit arson or burglary, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding one thousand dollars, or by both fine and imprisonment, at the discretion of the court. [Limitation, by section 4167, three years.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA }
 VS. }

The grand jury of the county of . . . in the name and by authority of the State of Iowa, accuse . . . of the crime of assault with intent to rob, committed as follows: The said . . . on the . . . day of . . . 187 . . . at the city of . . . county, Iowa, being then and there armed with a certain dangerous weapon, to-wit: an ax, did feloniously, and with force and violence, make an assault in and upon one J S, by putting in fear the said J S, a certain gold watch of the value of one hundred dollars, with intent to take and rob. contrary, etc. (or, if larceny, say, to feloniously take, steal, and carry away, a certain gold watch of the value of one hundred dollars, the property of said J S).

INDICTMENT.

In indictments for assaults with an intent to commit an offense, it is not necessary to make all the averments required in an indictment for the offense itself. For instance, in an indictment for murder, the indictment must charge the act to have been done with malice aforethought; this, however, would not be required in case of an assault to commit murder. *Commonwealth v. Rogers*, 5 Serg. & R., 463; *Commonwealth v. McDonald*, 5 Cush., 365; *State v. Newberry*, 26 Iowa, 467.

To charge "did, in and upon R. B., feloniously, make an assault with intent, the moneys, goods, and chattels, of R. B. then and there feloniously and violently to rob, steal, take and carry away against the form of the statute," etc., is held good. *Regina v. Huxley, Carr & M.*, 596. So, where A. was indicted in one count for feloniously assaulting the prosecutor with intent to steal his moneys and goods, and, in another count, for the misdemeanor of attempting to steal the same moneys and goods, he was found guilty on the first count; thereupon it was moved, in arrest of judgment, on the ground that the indictment was bad by reason of the misjoinder of the counts, *held*, that the objection was unfounded and that he was properly convicted. *Regina v. Ferguson*, Dears' C. C., 427.

EVIDENCE SUFFICIENT TO SUSTAIN THIS CHARGE.

It must be proved that the assault was made on the person intended to be robbed. *Rex v. Thomas*, 1 Leach. C. C., 330; 1 East. P. C., 417; *Rex v. Trusty*, 1 East. P. C., 418.

DEMAND.

There must be a demand of money or other property, as well as an assault, to constitute the offense. *Rex v. Parfait*, 1 Leach. C. C., 19; 1 East. P. C., 416.

OBJECT ATTAINED.

Whenever the law makes one step toward the accomplishment of an unlawful object, with the intent of accomplishing it, criminal, the person taking that step, with that intent, and capable of doing every act on his part to accomplish that object, cannot protect himself by showing that by reason of some fact, unknown at the time to him, it could not have been carried into effect. Where the assault was committed with intent to rob the prosecutor of five dollars, and where it appeared that he had none, a conviction could still be maintained. *Hamilton v. State*, 36 Ind., 280; 10 Am. Rep., 22; *Commonwealth v. Jacobs*, 9 Allen, 274.

ASSAULT WITH INTENT TO COMMIT A RAPE.

SECTION 3873. If any person assault a female with intent to commit a rape, he shall be punished by imprisonment in the penitentiary not exceeding twenty years. [Limitation by section 4166, eighteen months.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA, }
vs. }

The grand jury of the county of Linn, in the name and by the authority of the State of Iowa, accuse . . . of the crime of assault with intent to commit rape, committed as follows: The said . . . on the . . . day of . . . 187 . at the city of Marion, Linn county, Iowa, did willfully, unlawfully and with force and arms feloniously make an assault in and upon one . . . a female, with intent then and there, her the said . . . willfully, unlawfully and feloniously to ravish and carnally know, by force and against her will, contrary, etc

This form is substantially approved. *Crosswell v. People*, 13 Mich., 427; *People v. Lynch*, 29 Mich., 275; *O'Mera v. State*, 17 Ohio St., 515.

INDICTMENT—AGE OF FEMALE.

The indictment need not allege the age of the female except where the assault is upon a child under ten years; in that case the indictment must allege said child to be under ten years. *O'Mera v. State*, 17 Ohio St., 515; *State v. Newton*, 45 Iowa, 45.

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An indictment for an assault with intent to ravish, which did not state the act was done unlawfully or feloniously, was held bad as to the intent to ravish, but good as for an assault and battery. *Greer v. State*, 50 Indiana, 267; 1 Am. Cr. R., 643.

UNLAWFULLY—FELONIOUSLY.

To allege the act to have been feloniously done includes the term "unlawfully." *Greer v. State*, 50 Ind., 267; 1 Am. Cr. R., 643; *Weinzorflin v. State*, 7 Blackf., 186; *Sloan v. State*, 42 Ind., 570.

AGE, FAILURE TO STATE, EFFECT OF.

Where statutes divide the crime of rape upon females over and under a certain age, evidence of a rape of the one class will not sustain a conviction for a rape of the other class. *Greer v. State*, 50 Ind., 267; 1 Am. Cr. R., 643; 1 Whart. Crim. Law, Sec. 611; 1 Bish. Cr. Prac., Secs. 485, 486; *Turly v. State*, 3 Humphrey, 323; *Hooker v. State*, 4 Ohio, 348; *State v. Noble*, 15 Me., 476; *State v. Jackson*, 30 Maine, 29; *Dick v. State*, 30 Miss., 631. So, where there is no age stated, the court will not instruct that she was over a certain age, and evidence of a rape on a female under the age of twelve years will not sustain an indictment of that character. Authorities last cited.

EVIDENCE OF FEMALE.

The evidence of the female on whom the crime was committed is not absolutely necessary. The charge may be proved by other witnesses. *People v. Shaw*, 1 Park. Cr. R. 327.

SUFFICIENCY.

Where the prosecutrix, a white woman, having parted from a companion, started to go home alone, through the woods, she heard the respondent, a negro, call out to her to "stop," and saw him running after her about seventy yards away. She began to run as hard as she could, and was pursued by the defendant, who called to her to stop three times, and was catching up with her. He pursued about a quarter of a mile through the woods when, coming near a dwelling house, he ran off; held to be sufficient to constitute an assault, or an assault with an intent to commit a rape. *State v. Davis* 1 Ired., 125;

State v. Rawles, 65 N. C., 334; *State v. Vannoy*, Ib., 532; *State v. Neely*, 74 N. C., 425; 1 Am. Cr. R., 636.

PREVIOUS ASSAULTS.

In an indictment for an assault with intent to commit a rape, evidence of previous assaults on the prosecutrix are admissible to show the intent with which the act charged was committed. *State v. Walters*, 45 Iowa, 389.

PROOF OF OTHER FELONIES.

Nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue. Proof of some other felony, committed at a different time, and upon or against another person, having no connection with the crime charged, is not admissible. Ib.

VERDICT, FORM OF.

Where the court instructed that the form of the verdict may be: "We the jury find the defendant guilty"; or, "We the jury find the defendant not guilty," it was held to be incorrect. Where there are several grades to the offense, the jury must find if "guilty," of what degree; for instance, under a charge of an assault with an intent to commit a rape, it may be either as charged or a simple assault, and in either case it is necessary to know which the defendant is convicted of. *State v. Walters, supra*; Sec. 4429, Code 1873. So the prisoner may be convicted of an assault with intent to commit a rape, upon proof that a rape was actually committed. 43 Vt., 324.

ASSISTING PRISONERS TO ESCAPE.

SECTION 3956. If any person by any means whatever aid or assist any prisoner, lawfully detained in the penitentiary or in any jail or place of confinement for any felony, in an attempt to escape, whether such escape be effected or not, or forcibly rescue any person held in legal custody, upon any criminal charge, he shall be punished by imprisonment in the penitentiary not exceeding ten years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail not exceeding one year.

SECTION 3957. Every person who by any means whatever aids or assists any prisoner lawfully committed to any jail or place of confinement, charged with or convicted of any criminal offense other than a felony, in an attempt to escape, whether

such escape be effected or not; or who conveys into such jail or place of confinement any disguise, instrument, arms or other things proper or useful to facilitate the escape of any prisoner so committed, whether such escape be effected or attempted or not, shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment, at the discretion of the court.

SECTION 3958. Every person who aids or assists any prisoner in escaping or attempting to escape from the custody of any sheriff, deputy sheriff, marshal, constable or other officer or person who has the lawful charge of such prisoner upon any criminal charge, shall be punished by fine not exceeding one thousand dollars and imprisonment in the penitentiary not exceeding five years. [Limitation, by section 4167, three years.]

Form of Indictment under Sec. 3957.

District Court of the County of Linn.

THE STATE OF IOWA, }
vs. }

The grand jury of the county of Linn in the name and by authority of the State, of Iowa, accuse . . . of the crime of aiding a prisoner to escape, committed as follows: The said . . . on the . . . day of . . . , 187 . . . J D, while one A M was lawfully detained in the jail of Linn county, Iowa, by one L D, jailor of said county, by virtue of a certain warrant of commitment, issued by one C F, a justice of the peace of said county, on a charge of an assault with intent to kill, did feloniously, unlawfully and maliciously convey, deliver, and give to the said A M a certain steel file, with the intent then and there that the said A M should escape from said jail, the said file being an instrument calculated to facilitate the escape of said A M from the jail aforesaid, contrary, etc.

Form of Indictment under Sec. 3958.

District Court of the County of Linn.

THE STATE OF IOWA, }
vs. }

The grand jury of the county of Linn, in the name and by the authority of the State of Iowa, accuse . . . of the crime of assisting a prisoner to escape, committed as follows: The said . . . on the . . . day of . . . 187 . . . one L T being in the custody of P E, a constable for said township, by virtue of a certain warrant issued by W C, a justice of the peace for said county, on a criminal charge, to-wit., an assault and battery, and while the said P E was duly executing said warrant, by taking the said L T before W C, justice as aforesaid, the said defendant X Y did willfully, unlawfully, feloniously and by force, rescue and take from the custody of said P E the said L T, contrary, etc.

To assist a prisoner in escaping, when held for having threatened to commit a crime, is as much a violation of law as though he stood charged with its actual commission. *State v. Bates*, 23 Iowa, 96.

GUILT OR INNOCENCE OF PRISONER IMMATERIAL.

The defendant cannot avoid criminal liability by proving

that such prisoner is not, in fact, guilty. *State v. Bates*, 23 Iowa, 96.

The breaking or attempting to break jail, by reason of which another prisoner escapes, makes the first prisoner liable in assisting a prisoner to escape. *People v. Rose*, 12 Johnson, 338.

ESCAPE FROM PARTY HAVING NO AUTHORITY TO HOLD DEFENDANT.

In a case where a defendant is out on bail and his sureties desire to surrender him to an officer without furnishing such officer a certified copy of the recognizance, as by statute required, and the defendant escapes from an officer, it is held that the officer could not legally hold the prisoner without such certified recognizance, and a person who assisted the prisoner in escaping from the officer was not guilty of assisting a prisoner to escape, under such state of facts. *State v. Beebe*, 13 Kansas, 589; 19 Am. R., 93.

ATTORNEY'S FEES ALLOWED IN DEFENDING CRIMINALS.

SECTION 3829. An attorney appointed by a court to defend a person indicted for any offense, is entitled to receive from the county treasury the following fees:

For a case of murder, such fee as the court may fix;

For felony, such fee as the court may fix;

For misdemeanor, five dollars;

Any attorney selected by a peace officer for appearing and prosecuting before a justice of the peace a prosecution for selling intoxicating liquors, five dollars.

SECTION 3830. An attorney cannot in such case be compelled to follow a case to another county or into the Supreme Court, and if he does so, may recover an enlarged compensation, to be graduated on a scale corresponding to the prices above allowed.

SECTION 3831. Only one attorney in any case shall receive the compensation above contemplated, nor is he entitled to this compensation until he files his affidavit that he has not, directly or indirectly, received any compensation for such services from any source.

LAWS OF 1878, CHAPTER 91.

SECTION 1. Be it enacted by the General Assembly of the state of Iowa, that section 3829, title 23 of the Code, be and

the same is hereby amended by striking out of said section the words "such fee as the court may fix" where the same occur after the word "murder" and after the word "felony," and by inserting after the words "murder" the words "twenty-five dollars," and by inserting after the words "felony" the words ten (10) dollars.

SECTION 2. This act, being deemed of importance, to take effect after its publication in the *State Register* and *State Leader*.

Approved March 23, 1878.

BIGAMY.

SECTION 4009. If any person who has a former husband or wife living, marry another person, or continue to cohabit with such second husband or wife in this state, he or she, except in the cases authorized in the following section, is guilty of bigamy, and shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year.

SECTION 4010. The provisions of the preceding section do not extend to any person whose husband or wife has continually remained beyond seas, or who has voluntarily withdrawn from the other and has remained absent for the space of three years together, the party marrying again not knowing the other to be living within that time; nor to any person who has good reason to believe such husband or wife to be dead; nor to any person who has been legally divorced from the bonds of matrimony.

SECTION 4011. Every unmarried person who knowingly marries the husband or wife of another, when such husband or wife is guilty of bigamy thereby, shall be punished by imprisonment in the penitentiary not exceeding three years, or by fine not more than three hundred dollars and imprisonment in the county jail not exceeding one year.

SECTION 4163. When the offense of bigamy is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county. [Limitation, by section 4167, three years.]

Form of Indictment Under Section 4010.

District Court of the County of Linn.

THE STATE OF IOWA }
VS. }

The grand jury of the county of Linn, in the name and by authority of the State of Iowa, accuse . . . of the crime of bigamy, committed as follows: . . . did, on . . . at . . . willfully and unlawfully marry one J S, she at the time being a mar-

ried woman, and having a former husband living, to-wit: L S, and the said defendant, M J, being at the time a married man, and having a former wife living, to-wit: C J, contrary, etc. (or, under section 4011, where one is unmarried, use the following: . . . did, on . . . at . . . willfully and unlawfully marry one J S, she being at the time a married woman, having a former husband living, to-wit: L S, which was then and there well known to this defendant, who was then and there an unmarried man), contrary, etc.

INDICTMENT.

The indictment need not allege any exceptions named in statutes, as contained in the foregoing sections: *Romp v. State*, 3 G. Greene, 276; *State v. Williams*, 20 Iowa, 100; *Metzker v. People*, 14 Ill., 101; *Hirn v. State*, 1 Oh. St., 15; *Stanglein v. State*, 17 Oh. St., 461; 1 Wharton's Cr. Law, Sec. 278.

The indictment should allege that the first marriage was lawful, and at the time of the second marriage the defendant knew that his first wife was alive. *King v. State*, 40 Ga., 244.

In Alabama, it is necessary to allege and prove that the defendant married his second wife, or cohabited with her, in the county where the indictment was found. *Williams v. State*, 44 Ala., 24.

MARRIAGE, PROOF OF.

The evidence of a marriage by a religious ceremony would not raise the presumption that the civil ceremony had been performed, as required by a foreign law.

FOREIGN LAWS, EVIDENCE OF.

A transcript of a marriage record is not, *prima facie*, evidence of a marriage, without showing that such foreign law required the recording of such proceeding. 1 Greenleaf's Ev., Secs. 4 and 479; 4 Wheat. Rep., 298; *Stanglein v. State*, 17 Oh. St., 463.

COHABITATION—EVIDENCE.

It is not absolutely necessary to prove a marriage. Cohabitation is sufficient. *State v. Williams*, 20 Iowa, 100; *Car-michael v. State*, 12 Oh. St., 554. But see *contra*, 7 Am. Law Register, U. S., 737. The admissions of the defendant as to the marriage are sufficient. *State v. Sanders*, 30 Iowa, 584; *Wolverton v. State*, 16 Oh., 173; *Stanglein v. State*, 17 Oh. St., 460.

PARTICULARS OF CEREMONY.

The prosecution is not bound to show the language used by the married parties or the officer. *Fleming v. People*, 27 N. Y., 329; *People v. Calder*, 30 Mich., 90.

VOID MARRIAGE NO DEFENSE.

It is no defense that the second marriage was void. It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy; otherwise it could never exist, in ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards, by either of the parties, during the lifetime of the other. *Regina v. Brown*, 1 C. & K., 144. Though the second marriage was prohibited, such as the marriage of a negro to a white person, it is no defense. *People v. Brown*, 34 Mich., 339; *Rex v. Penson*, 5 C. & P., 412. The same rule is recognized in *Hayes v. People*, 25 N. Y., 390; 1 Am. Cr. R., 72; 22 Am. R., 531.

VOID IN ONE STATE AND VALID IN ANOTHER.

The Massachusetts statutes provide that where a party is divorced, on the ground of adultery, the guilty party, though divorced, cannot again marry, except with the permission of a court; and, under this statute, it was held that where such guilty party again married, without permission of the court, in the State of New Hampshire, and again returned to Massachusetts, and so resided and cohabited there with such second wife, he could not be convicted of bigamy, having been legally married in such other state, the Massachusetts statute not providing that such marriage in the other state should not be recognized or held invalid in the latter state. *Commonwealth v. Lane*, 113 Mass., 458; 18 Am. Rep., 509, citing in support *Commonwealth v. Putnam*, 1 Pick., 136-139; *Wightman v. Wightman*, 4 Johns. Ch., 333, 349, 351; 2 Kent's Com., 83; *Sutton v. Warren*, 10 Metc., 451; *Stevenson v. Gray*, 17 B. Mon., 193; *Bowers v. Bowers*, 10 Rich., 551; *Greenswood v. Curtis*, 6 Mass., 358, 378, 379; *Commonwealth v. Medway & Needham*, 16 Mass., 157; *West Cambridge v. Lexington*, 1 Pick., 506; *Putnam v. Putnam*, 8 Pick., 433; *Dickson v. Dickson*, 1 Yerger, 110; *Ponsford v. Johnson*, 2 Blatchford C. C., 51.

For marriages in accordance with laws of other states, see EVIDENCE; STATUTE LAW.

VARIANCE—PROOF.

Where the charge was that the first marriage was in B, and the evidence disclosed the fact that it was in N, this was not such a variance as to prove fatal. *People v. Calder*, 30 Mich., 90.

DISCREPANCY.

A discrepancy between the allegation and the proof, as to the middle name, is not material. *State v. Thompson*, 19 Iowa, 299; *State v. Williams*, 20 Iowa, 100.

DIVORCE—DEFENSE.

Fraud in the proceedings to obtain the divorce cannot be shown in this proceeding. Such showing must be made to the court rendering a decree, otherwise it is a good defense in a bigamy prosecution. *People v. Darole*, 25 Mich, 247, or 12 Am. Rep., 260.

CONFESSION OF PRISONER.

It is held in New York, that the mere confession of the prisoner is not sufficient evidence of the first marriage. *People v. Humphrey*, 7 Johns., 314; *Gahagan v. People*, 1 Park. Cr. Rep., 378.

ABSENCE OF HUSBAND.

Though the husband has been absent for more than five years, if the wife marries, knowing her husband to be still alive, it is bigamy. *Vallean v. Vallean*, 6 Paige, 207.

DECLARATION OF DEFENDANT.

The declarations of the defendant that a certain woman was his wife, and of the fact that he had lived with, recognized, introduced and represented her as his wife, is sufficient evidence of a marriage to submit to a jury. *Commonwealth v. Jackson*, 11 Bush, Ky., 679; 1 Am. Cr. R., 74.

BRIBERY OF OFFICERS OR JURORS.

SECTION 3939. If any person give, offer, or promise to any executive or judicial officer or member of the general assembly after his election or appointment, and either before or after

he has been qualified or has taken his seat, any valuable consideration, gratuity, service, or benefit whatever, with intent to influence his act, vote, opinion, or judgment in any matter, question, cause, or proceeding which may be pending or which may legally come or be brought before him in his official capacity, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not more than one thousand dollars and imprisonment in the county jail not more than one year.

SEC. 3944. If any person give, offer, or promise any valuable consideration or gratuity whatever, to any one summoned, appointed, or sworn as a juror; or appointed or chosen arbitrator, or umpire, or referee; or to any master in chancery; or appraiser of real or personal estate; or auditor, with intent to influence the opinion or decision of any such person in any matter, inquest, or cause which may be pending or can legally come before him, or which he may be called on to decide in either of said capacities, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year. [Limitations, by section 4167, three years.]

Form of Indictment.

District Court of the County of Linn.

STATE OF IOWA, }
vs. }

The grand jury of the county of Linn, in the name and by authority of the State of Iowa, accuse . . . of the crime of bribery of an officer, committed as follows: The said . . . on the . . . day of . . . 187 . . , at the city of Marion, Linn county, Iowa, did, willfully and unlawfully give to C D, the sum of ten dollars, said C D being then and there a judge duly elected and qualified, of the District Court of the Eighth Judicial District of Iowa, as a bribe and reward to obtain and procure a judgment and decree from the said C D as such judge, in a certain suit then and there pending before him in his said court in his said county and State, at the October term thereof, 1876, wherein A B was plaintiff and L M was defendant, said sum being then and there paid to said C D with intent to influence his acts and opinion in said cause, and said C D being a judicial officer at the time, contrary to and in violation of law. (Or, did unlawfully and feloniously, with intent to bribe and influence one G B in his decision and verdict in a certain cause then pending and on trial in the Circuit Court of Linn county, Iowa, at the June term, 1876, wherein A B was plaintiff and C D was defendant, and the said G B being then and there a juror duly sworn and impaneled to try said cause, said defendant then and there did offer to pay said G B, as such juror, the sum of five dollars, with intent unlawfully and feloniously to bribe said . . . and thereby intending to influence and cause said . . . in consideration of said sum paid, to render and use his influence, and procure a verdict to be rendered in favor of said defendant, in said cause, then pending in said Circuit Court, as aforesaid, contrary to and in violation of law.)

ELEMENTS.

A proposal by an officer to receive a bribe, though not bribery, is an indictable offense at common law. *Rea v. Vaughn*, 4 Burr, 2494; *Walsh v. The People of Illinois*, 12 Am. Law

Register, N. S., 617. The offer is a crime though the bribe be not taken. *State v. Ellis*, 4 Vroom, 102. In Alabama it must appear that the cause or proceeding was pending before the officer at the time. *Barefield v. State*, 14 Ala., 603.

JURISDICTION—VENUE.

Writing and mailing a letter offering a bribe in one State, directed to a person in another State, is an offense completed in the state where the post-office is situated. *United States v. Worral*, 2 Dallas, 384.

INDICTMENT.

It is not necessary to allege in an indictment that the defendant offered any specific sum of money, or other thing to an officer. *Commonwealth v. Chapman*. 1 Va. Cas., 138.

BRINGING PAUPERS INTO THIS STATE.

SECTION 4045. If any person knowingly bring within this State any pauper or poor person, with the intent of making him a charge on any of the townships or counties therein, he shall be punished by fine not exceeding five hundred dollars and stand charged with his support. [Limitation, by section 4167, three years.]

BURGLARY.

SECTION 3891. If any person break and enter any dwelling-house in the night time, with intent to commit any public offense, or after having entered with such intent, break any such dwelling-house in the night time, he shall be deemed guilty of burglary, and shall be punished according to the aggravation of the offense, as is provided in the next two sections.

SEC. 3892. If such offender, at the time of committing the burglary, is armed with a dangerous weapon, or so armed himself after having entered such dwelling-house, or actually assault any person being lawfully therein, or has any confederate present aiding and abetting in such burglary, he shall be punished by imprisonment in the penitentiary for life, or any term of years.

SEC. 3893. If such offender commit such burglary otherwise than is mentioned in the preceding section, he shall be punished by imprisonment in the penitentiary not exceeding twenty years.

SEC. 3894. If any person, with intent to commit any public offense, in the day time break and enter, or in the night time enter without breaking, any dwelling-house, or at any time break and enter any office, shop, store, warehouse, railroad car, boat or vessel, or any buildings in which any goods, merchandise, or valuable things are kept for use, sale or deposit, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one hundred dollars and imprisonment in the county jail not more than one year.

LAWS OF 1874, SECTION 1.

That if any person be found, having in his possession at any time any burglar tools or implements, with intent to commit the crime of burglary, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding thirty days, and it shall be the duty of the court before whom such conviction is had to retain possession of such burglar tools or implements, to be used in evidence in any court in which said person is tried.

LIMITATION.

The first four sections are governed by section 4167, three years; and the last section under the laws of 1874, is governed by section 4168, one year.

Burglary, under the common law, can only be committed in the night time, and must be in a dwelling-house. (Bouvier's Law Dictionary, Vol. 1, p. 196; Bishop's Crim. Law, Vol. 1, p. 169; *Ib.*, Vol., 2, p. 60; 1 Russ. on Crimes, p. 785.) This common law rule, however, has been modified to some extent by different statutes of different states. Under the Iowa Code, sections 3891, 3893 and 3894, above cited, the violation of either section would be burglary, though the act of breaking and entering is done in the day time, and does not necessarily have to be in a dwelling-house. By the New York statutes it is distinguished by burglary in the first, second and third degrees. Similar statutes are passed in other states, and no other or different name is known for the violation of sections 3893 and 3894 except that of burglary, although the word *burglary* is not mentioned in section 3894. So, the revised Code of Alabama, section 3695, contains the precise language of sections 3894 of the Iowa Code, and makes the violation

thereof burglary, and this is declared by the Supreme Court of that state to be a modification of the common law rule, and a conviction thereunder was sustained. *Anderson v. State*, 48 Alabama, 665; *State v. Hayden*, 45 Iowa, 11.

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA }
vs. } Burglary.

The grand jury of the county of Linn, in the name and by authority of the State of Iowa, accuse . . . of the crime of burglary, committed as follows: The said . . . did, on or about the . . . day of . . . , 187 . . . , at about the hour of two o'clock in the night of the same day, with force and arms, unlawfully, feloniously, and burglariously break and enter a certain store of . . . , in which goods, wares, and merchandise were kept for sale, use, and deposit, by the said . . . , with a felonious intent by the said . . . , then and there feloniously to take, steal, and carry away the property of the said . . . , then and there to commit a public offense, to-wit: larceny, contrary to and in violation of law.

This form is approved. *State v. Hayden*, 45 Iowa, 11; *People v. Thompson*, 3 Park. Cr. R., 208; *Anderson v. State*, 48 Alabama, 665; 2 Green's Cr. R., 620.

Or, under the laws of 1874, for having in possession burglars' tools:

. . . for that the defendant, on the . . . day of . . . , 187 . . . , at the city of Marion, township of Marion, said county and State, was found having in his possession unlawfully, burglars' tools, to-wit: one file, one saw, and two hammers, with intent to commit the crime of burglary, contrary to and in violation of law.

The violation of the last section named, and to which this last form applies, is within the jurisdiction of a justice, and not indictable.

An indictment under the statutes and decisions of New York, may be in the following form:

. . . with force and arms, about the hour of twelve o'clock in the night of the same day, at, etc., the house of . . . there situated, feloniously, break and enter with intent, the goods and chattels and property of the said . . . , in the said house then and there feloniously to steal, take and carry away, to the great damage, etc.

People v. Thompson, 3 Park. Cr. R., 208.

INDICTMENT—VENUE.

The indictment should always set out where the offense was committed, at least the county. *State v. Reid*, 20 Iowa, 413.

NAME OF OWNER.

The name of the owner of a building should always be given. *State v. Morrissey*, 22 Iowa, 158; *Willis v. People*, 1 Scam. (Ill.), 399; *Com. v. Williams*, 2 Cush., 582; *Spencer v. State*, 13 Ohio, 401; *Dutoher v. State*, 18 Ib., 308. And,

if occupied by tenants, to allege the owner's name is sufficient. *People v. Bush*, 3 Park. Cr. R., 552. So, to allege as the property of the estate of "A" is good. *Anderson v. State*, 48 Alabama, 665; 2 Green's Cr. R., 620.

OCCUPANCY OF BUILDING.

When the breaking is from the outside, it is not necessary to allege that some one occupied the building at the time. Whart. Cr. Laws, 1531, 1572, 1573. *Com. v. Brown*, 3 Rawle, 207; *Rex v. Murray*, 2 East, P. C., 496; *State v. Reid*, 20 Iowa, 413.

NIGHT-TIME.

Where the indictment does not charge the breaking to have been done in the night-time, it comes within the provisions of section 3894, Iowa Code. *Butler v. People*, 4 Denio, 68.

BURGLARY—LARCENY—DUPLICITY.

Under the Iowa Code the indictment should charge but one offense. In *State v. Hayden*, the indictment contained but one count, and in it charged burglary, and also in the same count charged that the defendant "did then and there, take, steal, and carry away the goods," etc. The court held the indictment good, and that part which charged the actual taking as surplusage. *State v. Hayden*, 45 Iowa, 11. In a still later case (*State v. Riddle and Johnson*, decided at the October Term, 1877, at Davenport), the indictment was similar to that of *State v. Hayden*. In this latter case the court instructed, that the indictment included three crimes of different degrees of enormity; first, the crime of larceny in a store in the night-time, the highest; second, the crime of breaking and entering a store in which goods, merchandize, and valuable things were kept for use, sale, and deposit, with intent to commit larceny, the next lower offense; third, the crime of simple larceny. The jury were further instructed that under the indictment a verdict might be found, for any one of all the three crimes above named, if the evidence should be found sufficient to warrant such verdict. These instructions the court held to be erroneous, holding that the defendants could not be tried on the several charges and offenses, and reversed the action of the District Court. On the filing of this opinion the Attorney

General of the State filed his petition for a rehearing. The opinion on this petition was filed April 20th, 1878, at Dubuque. The court adhered to its former opinion. Cause reversed. Also, *State v. Rhodes*, September Term, 1877.

The Supreme Court of Alabama held, that under Sec. 3695, Revised Code of that State, which is the same as Sec. 3894 of the Iowa Code, that burglary is defined differently from the common law, and under that section a count for burglary does not include, or authorize a conviction for larceny. *Fisher v. State*, 46 Ala., 720; *Bell v. State*, 48 Ib., 684; and in a later case the court add, "Under our Code burglary and grand larceny are distinct felonies of the same grade, subject to the same punishment, and may be joined in the same indictment, but are not subject to the doctrine of merger." *Johnson v. State*, 29 Ala., 62; *Hamilton v. State*, 36 Ind., 286; *Wilson v. State*, 37 Ala., 134; 17 Am. R., on page 48.

DUPPLICITY—SEPARATE COUNTS.

In case of *Com. v. Burchell*, 69 Penn. St., 482, 8 Am. R., 283, the court held that separate crimes, such as burglary in one count and larceny in another count, the breaking, entering and stealing being done at the same time, is part of the same transaction, and is bad for duplicity. This precise point has recently been decided in the case of *State v. McFarlan*, in which the breaking and stealing was done at the same time and place and the indictment charging in two counts, first burglary, and second larceny. The opinion was filed at the June Term, 1878, in which the court say:

"The Code, section 4300, is as follows: "The indictment shall charge but one offense; *provided*, that in case of compound offenses, where in the same transaction more than one offense has been committed, the indictment may charge the several offenses, and the defendant may be convicted of any offense included therein." Burglary is an offense, and larceny is an offense. Unless the burglary is a compound offense, including within it the crime of larceny, so that both when committed at the same time may be charged in the indictment, it is clear that the indictment in question violates the provisions of this section, and is bad for duplicity. In *State v.*

Hayden, 45 Iowa, 11, in which the indictment charged the defendant with breaking and entering with intent feloniously to steal, and with stealing, it was held that the indictment did not charge two offenses, but that the allegation that the intent to steal was consummated, might be regarded as no more than an allegation of the evidence, by which the intent to steal was to be established, and might be rejected as surplusage. In the subsequent case of *The State v. Ridly & Johnson*, October Term, 1877, the defendants, under a like indictment, were convicted of larceny, and it was held that the conviction could not be sustained, for the reason that burglary does not, as a compound offense, include the crime of larceny, and that burglary was the only offense properly charged in the indictment. The decision in this case was adhered to upon petition for rehearing, April Term, 1878, and was followed in *State v. Rhodes*, at the same term. These last cases are decisive of the present one, for if burglary does not, as a compound offense, include the crime of larceny, burglary and larceny cannot, under our statute be charged in different counts of an indictment. The indictment is bad for duplicity. *Reversed.*"

MUST CHARGE A CRIME KNOWN TO THE LAWS.

An indictment for burglary, breaking and entering with intent to commit a crime, must charge acts which constitute crime. *Held*, that where the charge was the breaking with intent to commit larceny, to-wit, the stealing of a dog, it charged no crime. *State v. Lymas*, 26 Ohio St., 400; 20 Am. R., 772.

BREAKING OUT OF A BUILDING.

Where it is sought to convict a defendant with breaking *out* of a building the indictment must charge the breaking out; and an allegation of breaking in does not sustain a conviction of breaking out. *State v. McPherson*, 70 N. C., 239; 16 Am. R., 769; 2 Green Crim. R., 739.

HOUSE, DWELLING—OMISSION OF THE WORD "DWELLING."

Where an indictment charges "breaking and entering the house of A," it was held that the word "house," in its com-

mon acceptation meant a "dwelling house." *Thompson v. People*, 3 Park. Crim. R., 208.

ENTRY, ALLEGATION OF.

To charge "feloniously and burglariously, forcibly burst, and did break with intent," etc, is insufficient for failing to charge an entry. *State v. Whitby*, 15 Kansas, 402.

NIGHT TIME, WHAT IS CONSIDERED TO BE.

Under the English statute the night shall be deemed to commence at nine in the evening, and conclude at six in the morning. Fisher's Crim. Law, page 69.

ELEMENTS CONSTITUTING BURGLARY.

The actual breaking is not necessarily essential. The pushing open a door, or lifting up a window or trap door may be deemed sufficient. *State v. Wright*, 20 Iowa, 421; *Wine v. State*, 25 Ohio State, 69; *Com. v. Strupney*, 7 Am. R., 556; 105 Mass., 588; *Dennis v. People*, 27 Mich., 151. So the descending a chimney. 27 Mich., 151. But a mere raising a partly opened window is not burglary. 105 Mass., 205; 7 Am. R., 556. So the unlatching a cellar door is burglary. *McCourt v. People*, 64 New York, 583; *Martin v. State*, 1 Texas Court of Appeals, 525.

ADJOINING ROOMS.

Burglary may be committed by entering an adjoining room. 25 Ohio St., 7; 42 Vt., 629; 1 Hale, 556; *People v. Bush*, 3 Park. Cr. R., 552; *People v. McCloskey*, 5 Park. Cr. R., 57; *Martin v. State*, 1 Texas Court of Appeals, 525.

UNLATCHING DOORS.

It is well settled that unlatching a door which is only latched is a sufficient breaking to constitute burglary at common law. 1 Hale, 552; 2 East. P. C., 487. This rule has been recognized in *Curtis v. Hubbard*, 1 Hill., 238; *People v. Bush*, 3 Park. Cr. R., 552; *Dennis v. People*, 27 Mich., 151; 2 Green Cr. R., 565. So the raising of a transom window on hinges constitutes burglary.

FORCE.

Actual force in breaking and entering is not required. 18

Ohio, 308, 317; *Martin v. State*, 1 Texas Court of Appeals, 525.

EVIDENCE—CHARACTER OF DEFENDANT.

Evidence that the defendant had committed the like offenses in the same house before, is inadmissible. *Lightfoot v. People*, 16 Mich., 507.

POSSESSION OF STOLEN PROPERTY.

The possession of stolen property, alleged to be stolen at the time of the commission of the alleged burglary, is not *prima facie* evidence of the defendant's guilt of burglary. 19 Ohio St., 363; *Davis v. People*, 1 Park. Cr. R., 447; while it was held in *Commonwealth v. Willard*, 1 Mass., 6, where the indictment was for shop breaking and stealing goods, and a part of the goods were found in the possession of the prisoner, the court in instructing the jury stated the rule of law to be, that the proof of the possession was presumptive evidence not only that he stole the whole of the articles taken from the shop, but also of his breaking and entering, as alleged in the indictment. But in that case it appears that the prisoner refused to give any account of how he came by the goods. In *People v. Frazier*, 2 Wheeler's Cr. Cas., 35, it was held that possession of the goods was presumptive evidence of larceny, but not of burglary. There should, however, be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary is super-added to that of larceny. 1 Park. Cr. R., 447; *Jones v. People*, 6 Park. Cr. R., 126; *State v. Reed*, 20 Iowa, 413.

INTENT—REMOVAL OF GOODS.

It is not necessary that goods should be actually taken or removed to constitute burglary. 5 Bush (Ky.), 376. There must be an intent to commit a crime. Intent, however, is inferred and found from facts and circumstances. 64 N. Y., 583.

DRUNKENNESS.

The entering a building without intent to commit any crime, will not support a conviction for burglary. So, where a drunken man entered a building without any further evidence

or acts of intent to commit a crime, it was held not burglary. 29 Iowa, 316; Ray's Medical Jurisprudence, Chap. 25, Secs. 453, 455, 456; Bishop's Cr. Law, Vol. 1, Secs. 389, 490, 491; 1 Colden, 514; 4 Humphrey (Tenn.), 136.

VERDICT—BURGLARY—LARCENY.

Under a general verdict of guilty, under the Ohio statute, the prisoner may be sentenced for burglary, but not for larceny. 12 Ohio St., 146.

Where the jury found the prisoner guilty of entering a dwelling, held that it was proper for the court to regard the verdict as special, and to reconsider it. *State v. Maxwell*, 42 Iowa, 208.

There must be both a breaking and entering to constitute burglary. *Rex v. Hughes*, 1 Leach C. C., 406; 2 East. P. C., 491. So, where the thief enters a dwelling house at night, through an open door or a window, yet if, when within, he breaks or opens an inner door, with intent to commit felony, it is burglary. *Rex v. Johnson*, 2 East. P. C., 488. Introducing the hand between the glass of an outer window and an inner shutter is a sufficient entry to constitute burglary. *Rex v. Bailey*, R. & R. C. C., 341. It is not sufficient to constitute the offense of burglary that there was an entry without a breaking of the outer door, and a breaking without an entry of the inner one. *Reg. v. Davis*, 6 Cox C. C., 369.

And it is a sufficient breaking to constitute such an offense, if the party breaks a pane of glass of a window and puts his hand in for the purpose of opening the shutter, although he did not succeed in doing so. *Rex v. Perkes*, 1 C. & P., 300, Park.

Lifting the flap of a cellar, usually kept down by its own weight, is a sufficient breaking for the purpose of burglary. *Rex v. Russell*, 1 M. C. C., 377.

A shutter box partly projected from a house, and adjoined the side of the shop window, which was projected by wooden pannelling lined with iron: *Held*, that the breaking and entering the shutter box did not constitute burglary. *Rex v. Paine*, 7 C. & P., 135, per Denman, Park, Bolland.

A was charged with breaking into the house of K and stealing the goods of M. It was proved, as to the breaking, that

the glass of the window had been cut about a month before, but that every portion of the glass remained in its place till he pushed it in, and stole the goods: *Held*, a sufficient breaking. *Reg. v. Bird*, 9 C. & P., 44 Bosanquet.

Where, in breaking a window, in order to steal property in the house, the prisoner's finger went within the house, *held*, that there was a sufficient entry to constitute burglary. *Rex v. Davis*, R. & R. C. C., 499.

Throwing up a window and introducing an instrument between such window and an inside shutter, to force open the shutter, if the hand or some part of it is not within the window, is not a sufficient entry to constitute burglary. *Rex v. Rusk*, 1 M. C. C., 183.

So, where the prisoner raised a window which was not bolted, and thrust a crowbar under the bottom of the shutter (which was about half a foot within the window), so as to make an indent on the inside of the shutter, but from the length of the bar his hand was not inside the house, *held*, that it was not a sufficient entry to constitute burglary. *Rex v. Roberts*, Carr. C. L., 293; 2 East. P. C., 487.

Where a window opens upon hinges, and is fastened by a wedge, so that the pushing against it will open it, forcing it open by pushing against it is a sufficient breaking to constitute a burglary. *Rex v. Hall*, R. & R. C. C., 355.

Removing the fastening of a window by the hand introduced through a partially broken pane of the window, and thereby opening the window and entering, is a breaking; not by breaking the residue of the pane but by unfastening and opening the window. *Rex v. Robinson*, 1 M. C. C., 327; *S. P. Ryan v. Shilcock*, 7 Exch., 72.

A chimney is part of a dwelling house, and, therefore, the getting in at the top, is a breaking of the dwelling house; and where the prisoner, by lowering himself in the chimney, made an entry into the dwelling house, though he did not enter any of the rooms, it is sufficient to constitute burglary. *Rex v. Brice*, R. & R. C. C., 450.

Pulling down the sash of a window is a breaking sufficient to constitute burglary, although it has no fastening, and is only kept in its place by the pulley weight; and it is equally

a breaking, although there is an outer shutter which is not put to. *Rex v. Haines*, R. & R. C. C., 451.

A window was a little open, and the prisoner pushed it wide open and got in: *Held*, no sufficient breaking. *Rex v. Smith*, Car. C. L., 293; 1 M. C. C., 178.

When the family within the house was forced by threats and intimidations, to let in the offenders by one of them opening the door, *held*, that it was as much a breaking by those who made use of such intimidations without, to prevail upon them so to open it, as if they had actually burst the door open. *Rex v. Swallow*, 2 Russ. C. & M. 9, Thompson.

On an indictment for burglary, it was proved that the legs of the prisoner were seen hanging about a foot from the ground from a window, and no other part of his body was visible till he jumped down and ran away: *Held*, that though it appeared there was a hole broken in the window large enough to admit a man's head and shoulders, there was no evidence to show that there had been any actual entry, no property being lost. *Reg. v. Meal*, 3 Cox C. C., 70, Coltman.

A servant pretended to concur with two persons, who proposed to him to unite with them in robbing his master's house. The master being out of town, the servant communicated with the police and acted under their instructions. In consequence of this, a little after nine o'clock one evening, he let in one of the persons by lifting the latch; but before that person had taken any property he was seized by the police, and a crow-bar being found upon him, was immediately placed in confinement. After this the servant went out again, and brought the second person, and let him in in the same manner. This person was seized with a basket of plate in his hand, which he had carried from the kitchen part of the way up stairs: *Held*, that neither of the persons could be convicted of burglary; but the one who was seized with the plate might be convicted of entering a dwelling house, and, also, that the other might be indicted as an accessory before the fact to such stealing. *Reg. v. Jones*, Car. & M., 218, Maule and Rolfe.

BURNING PROPERTY.

SECTION 3886. If any person willfully and maliciously burn, or otherwise destroy or injure any pile or parcel of

wood, boards, timber, or lumber, or any fence, bars, or gate, or any grain, hay, or other vegetable product severed from the soil, or any standing tree, grain, grass, or other standing product of the soil the property of another, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year. [Limitation, by section 4167, three years.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA }
VS. }

The grand jury of the county of Linn, in the name and by authority of the State of Iowa, accuse . . . of the crime of burning property, committed as follows: The said . . . on the . . . day of . . . 187 . . . at the city of Marion, Linn county, Iowa, did unlawfully and willfully break down, set fire to, and burn, a certain bridge, situate and being in said county and State, and the property of Linn county, contrary to and in violation of law.

CANADA THISTLES.

SECTION 4062. If any person or corporation, after having been notified in writing of the presence of Canada thistles on any lands owned or occupied by such person or corporation; or if any highway supervisor, after having been notified in writing of the presence of Canada thistles on the highway in his jurisdiction, shall permit such thistles or any part thereof to blossom or mature, such person, corporation, or highway supervisor, shall be deemed guilty of a misdemeanor and be punished accordingly. [Limitation, by section 4167, three years. There being no punishment prescribed by the section itself, it falls within the provisions of section 3967 as an indictable misdemeanor.]

NOTICE OF EXISTENCE OF THISTLES.

The form of the notice may be as follows:

To A B, road supervisor of road district No. 1, Marion township, Linn county, Iowa: You are hereby notified that there are Canada thistles standing and growing on and along the highway known as and called "Ashworth's road" leading from M to C, and being under your jurisdiction as road supervisor; and you are hereby requested to destroy the same.

ELIAS DOTY.

Form of Information.

THE STATE OF IOWA }
VS. }

Before . . . a justice of . . . county.
Information.

The defendant is accused of the crime of permitting Canada thistles to mature along a highway. For that the said A B, did on the . . . day of . . . 187 . . . at Marion township, Linn county, Iowa, he the said defendant being the road supervisor of road district No. 1, Marion township, county and state aforesaid, and after having been duly notified in writing of the existence of certain Canada thistles, the same being under his jurisdiction as such supervisor, unlawfully did permit such thistles to blossom and mature, contrary to and in violation of law.

CARNAL KNOWLEDGE BY ADMINISTERING DRUGS.

SECTION 3863. If any person unlawfully have carnal knowledge of any female by administering to her any substance, or by any other means producing such stupor, or such imbecility of mind or weakness of body as to prevent effectual resistance, or have such carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance, he shall, upon conviction, be punished as provided in the section relating to ravishment. [Limitation, by section 4167, three years.

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA }
VS. }

The grand jury of the county of Linn, in the name and by authority of the State of Iowa, accuse . . . of the crime of having carnal knowledge of a female by administering drugs, committed as follows: The said . . . on the . . . day of . . . 187 . . . at the city of Marion, Linn county, Iowa, did, in and upon one E F, a female, unlawfully and feloniously make an assault, and did then and there unlawfully and feloniously have carnal knowledge of her, the said E F, without her consent, by then and there administering to her a certain drug, the name of which is to these jurors unknown, which caused and produced in her the said E F, such stupor and imbecility of mind and weakness of body as to prevent any effectual resistance, and did prevent any resistance by her, the said E F, to and against the said A B, whereby, and by reason of which, he, the said A B, did, unlawfully and without her consent forcibly and feloniously carnally know her the said E F, contrary to and in violation of law.

CARRYING CONCEALED WEAPONS.

SECTION 3879. If any person carry upon his person any concealed weapon, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not more than one hundred dollars or imprisoned in the county jail not more than thirty days; *provided*, that this section shall not apply to police officers and other persons whose duty it is to execute process or warrants or make arrests. [Limitation, by section 4168, one year.]

This offense is within the jurisdiction of a justice of the peace originally, the grand jury having no jurisdiction. Bill of Rights, Constitution of Iowa, Article I, Section 11.

Form of Information.

THE STATE OF IOWA }
VS. }

Before . . . a justice of . . . county.
Information.

The defendant is accused of carrying concealed weapons: For that the defendant, on the . . . day of . . . in Marion, county and State aforesaid, did willfully and unlawfully carry upon his person and have in his possession a certain concealed

weapon, to-wit: a certain pocket pistol, the said defendant not being a police officer, or a person whose duty it was to execute process, warrants, or make arrests, and contrary to and in violation of law.

INFORMATION, SUFFICIENCY OF.

An information for carrying a pistol concealed, need not state that it was loaded. *State v. Duzan*, 6 Blackf., 31; *Gamblin v. State*, 45 Miss., 658.

DEFENSE—CONSTRUCTION OF "TRAVELING."

Where a statute prohibits the carrying of concealed weapons, but excepts those who are traveling, the word "traveling" is construed to mean from place to place irrespective of distances. *Lockett v. State*, 47 Ala., 42; 1 Gr. Cr. Rep., 461.

CONSTITUTIONALITY.

Acts similar to the above are held to be constitutional and not in violation of the State constitutional rights of persons. 8 Am. Rep., 8; *Andrews et al. v. State*, 3 Hiskell Tenn., 165; *Andrews et al. v. State*, 1 Gr. Cr. Rep., 466; *State v. Jumel*, 13 La. An., 399; *Stockdale v. State*, 31, Ga., 225; *Owen v. State*, 31 Ala., 387; *Cochran v. State*, 24 Tex., 394; *Carroll v. State*, 18 Am. Rep., 539; *Buzzard v. State*, 4 Ark., 18; *State v. Mitchell*, 3 Blackf., 229. Same as to the United States Constitution. *English v. State*, 14 Am. Rep., 374; *English v. State*, 35 Tex., 472. A contrary doctrine was held in *Bliss v. Commonwealth*, 2 Litt., Ky., 90.

EVIDENCE.

Under a charge alleging that the defendant carried "concealed deadly weapons, to-wit: a bowie knife, and also a dagger," it is sufficient to prove that he carried either. *Commonwealth v. Howard*, 3 Metc., Ky., 407.

DEFENSE.

It is no defense that the defendant carried a weapon for the purpose of hunting or killing stock off of his premises, or that the defendant had no other means of killing his beef. *Baird v. State*, 38 Texas, 600; *Titus v. State*, 42 Texas, 579; 1 Texas Court of Appeals, 620.

CEMETERIES AND PROTECTION THEREOF.

LAWS OF 1878, CHAPTER 106.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That the trustees, board of directors, or other officers having the custody and control of any cemetery in this state shall have power, subject to the by-laws and regulations of said cemetery, to inclose, improve, and adorn the grounds of such cemetery, to construct avenues in the same, to erect proper buildings for the use of said cemetery, to prescribe rules for improving or adorning the lots therein, or for the erection of monuments or other memorials of the dead upon such lots; to prohibit any use, division, improvement, or adornment of a lot which they may deem improper.

SEC. 2. Any person who shall willfully and maliciously destroy, mutilate, deface, injure, or remove any tomb, vault, monument, gravestone, or other structure placed in any public or private cemetery in this state, or any fences, railing, or other work for the protection or ornamentation of said cemetery, or of any tomb, vault, monument or gravestone, or other structure aforesaid, on any cemetery lot within such cemetery, or shall willfully and maliciously destroy, cut, break, or injure any tree, shrub, plant, or lawn within the limits of said cemetery, or shall drive at unusual and forbidden speed over the avenues or roads in said cemetery, or shall drive outside of said avenues and roads and over the grass or graves of said cemetery, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof before any court of competent jurisdiction, be punished by a fine of not less than five dollars nor more than one hundred dollars, or by imprisonment in the county jail for a term of not less than one nor more than thirty days, in the discretion of the court; and such offender shall also be liable in an action of trespass, in the name of the person or corporation having the custody and control of said cemetery grounds, to pay all such damages as have been occasioned by his unlawful act or acts, which money, when recovered, shall be applied by said person or corporation to the reparation and restoration of the property so injured or destroyed, if the same can be so repaired or restored.

SEC. 3. It shall be lawful for the trustees, directors, or other officers having the custody and control of any cemetery in this state, to appoint as many day and night watchmen of their grounds as they may think expedient, and such watchmen, and, also, all their sextons, superintendents, gardeners,

and agents stationed upon or near said grounds, are hereby authorized to take and subscribe before any mayor of a city or justice of the peace of the township where such cemetery is situated, an oath of office similar to that required by law of constables, and upon the taking of such oath such watchmen, sextons, superintendents, gardeners and agents, shall have, exercise, and possess all the powers of police officers within and adjacent to the cemetery grounds, and they and each of them shall have power to arrest any and all persons engaged in violating the laws of this state in reference to the protection, care, and preservation of cemeteries, and of the trees, shrubbery, plants, structures, grass, and adornments therein, and to bring such persons so offending before any justice of the peace within such township, to be dealt with according to law.

SEC. 4. This act, being deemed of importance, shall take effect and be in force from and after its publication in the *Des Moines Register* and *Des Moines Leader*.

Approved March 25, 1878.

CHEATING BY FALSE PRETENSES.

SECTION 4073. If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods or other property; or so obtain the signature of any person to any written instrument, the false making of which would be punished as forgery, he shall be punished by imprisonment in the penitentiary not more than seven years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year. [Limitation, by section 4167, three years.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA }
vs. } False Pretenses.

The grand jury of the county of . . . , in the name and by authority of the State of Iowa, accuse . . . of the crime of obtaining money (property) under false pretenses, committed as follows: On the . . . day of . . . , 1868, one A B was the owner of a certain four-year-old horse, being a bay with a white strip in face, and of the value of sixty dollars; and this said defendant, on said day, for the purpose of procuring said horse by false pretenses, and to have said A B believe that the defendant was solvent and responsible for his contracts, offered to said A B his note for said sum of sixty dollars, due in thirty days from date, for said horse, and did then and there, for the purpose of inducing said A B to part with his property, unlawfully, designedly, falsely and feloniously pretend and represent to said A B that he was the owner of a certain two-story brick house in Marion, Iowa, and that he had on deposit in the First National Bank of Marion the sum of one thousand dollars; and that if said A B would take his note for said horse, the said note would be paid on presentation at the said bank, intending that the said A B should believe said statements to be true; and the said A B, believing the said representations to be true,

and being deceived thereby, was induced, by reason of said false pretenses, to part with his said horse, and accepted the defendant's note therefor, believing that said note would be paid on presentation thereof at said bank, and which note or the payment thereof was refused when presented. Whereas, in truth and in fact said defendant was not the owner of said building at the time, nor had he any interest therein, nor has he now, nor has he had any money on deposit in said First National Bank on said day or since, all of which was well known to the defendant, and which the defendant knew at the time to be false, contrary, etc.

This form is substantially sustained in *State v. Dowe*, 27 Iowa, 273.

INDICTMENT.

An indictment which alleges that the defendant procured the signature of another to a note, "by false representations," sufficiently charges the crime of cheating by false pretenses. A pretense is "the holding out or offering to others something false and feigned." This may be done either by words or actions, which amount to false representations. In fact, false representations are inseparable from the idea of a pretense, for, without a representation which is false, there could be no pretense. *State v. Joaquin*, 43 Iowa, 131.

SPECIFICATIONS.

There is no such thing as filing specifications in addition or in support of an indictment, and the court has no power to compel a prosecutor to file any. *United States v. Ross*, Morris (Iowa), 165.

FALSE PRETENSES.

The indictment must clearly state that the money was obtained by means of false pretenses. *State v. Webb*, 26 Iowa, 262.

MATERIALITY.

It must be averred that the representations were material. *State v. Webb*, 26 Iowa, 263; *Dillingham v. State*, 5 Ohio St., 283.

RANDOM STATEMENTS.

A mere random statement or praise of property is not sufficient. It must allege certain facts; and that if it had not been for such representations the prosecutor would not have parted with his property. *Enders v. People*, 20 Mich., 239; *Dillingham v. State*, 5 Ohio St., 284.

AVERMENT OF RELIANCE.

It is not essential to aver that the prosecutor relied upon the

pretenses (*Morris v. State*, 25 Ohio St., 225), while it is held by other authorities, if there is no allegation that the prosecutor relied on the false pretenses, the indictment is bad; and this seems to be the law generally. *Jones v. State*, 50 Ind., 473; 1 Am. C. R., 218.

ALLEGATION OF OWNERSHIP.

The indictment must state to whom the goods belonged, and if obtained for an invalid bill it should aver that defendant knew the bill to be invalid. *State v. Smith*, 8 Blackford, 489; *State v. Lathrop*, 15 Vt., 279; *Lobold v. State*, 33 Ind., 484; *Thompson v. People*, 34 Ill., 60; 41 Texas, 583; 42 Ib., 79; 7 Wis., 676.

KNOWLEDGE OF FALSITY.

An indictment for false pretenses which does not allege that the defendant "knowingly" made the false pretenses, is bad. *Maranda v. State*, 44 Texas, 442; 1 Am. Cr. R., 225; *Marada & Ortise v. The State*, cited in *Hirsch v. State*, 1 Texas Cr. R., 393.

SALE OF INSTRUMENT.

An indictment for false pretenses in selling a mortgage which alleges that the prisoner pretended that he had recently sold the real estate covered by the mortgage, and that said real estate was situated in I., but which does not give the name of the purchaser or describe the property, without alleging that such name and description are unknown, is bad, as being too uncertain and indefinite. *Keller v. State*, 51 Ind., 111; 1 Am. Cr. R., 211.

ELEMENTS.

Two things are essential, one the representation as an existing fact; the other the reliance upon the representation as being true. *People v. Tompkins*, 1 Park. Cr. R., 224; *People v. Miller*, 2 Park. Cr. R., 197; and also of its falsity. *State v. Lewis*, 45 Iowa, 20; *Scott v. People*, 62 Barb., 62.

OBTAINING CREDIT ON A NOTE.

It is not obtaining property under false pretenses to obtain a credit or indorsement on a note. 2 Bishop Crim. Law, 391; 2 Whart. Crim. Law, Sec. 2138; *State v. Moore*, 15 Iowa, 412.

SURRENDER OF TITLE AND POSSESSION.

In order to justify the conviction of an accused for obtaining property under false pretenses, either the title to the property or an unqualified right of possession thereof must have been obtained. Where the defendant gave his conditional note for a machine, the note providing that the title shall not pass until the note is paid, and also certifying that he owned certain lands, on which representations the machine was sold, it was *held* that the defendant could not be convicted, as the title never passed. *State v. Anderson*, Iowa Supreme Court, *WESTERN JURIST*, January No., 1878, page 30; 3 Archbold's *Crim. Prac.*, 467; 3 Greenleaf *Ev.*, Sec. 160; *State v. Vickery*, 19 Texas, 326.

PRETENSES—INDUCEMENTS.

It is not necessary that the false pretenses should have been the sole cause which moved the prosecutor to part with his property. *State v. Thatcher*, 35 N. J., 445; 1 Green's *Crim. R.*, 562; 13 Wend., 87.

OPINION.

The mere matter of a false affirmation or expression of an opinion will not render one liable or sustain a conviction. *State v. Webb*, 26 Iowa, 262; 1 Park. Cr. R., 224, 238; 9 Ga. R., 430; 5 Dutcher, 13; *Bishop v. Small*, 63 Me., 12; *Rex v. Red*, 32 Eng. Com. Law, 904; *State v. Stanley*, 64 Me., 157; 1 Am. Cr. R., 209.

ON SALE OF HORSE.

In the sale of a horse, a pretense that the horse was sound, when the defendant knew that he was not, is a false pretense within the statute. *State v. Stanley*, 64 Me., 157; 1 Am. Cr. R., 209; *State v. Mills*, 17 Me., 211; *State v. Dorr*, 33 Me., 498; *People v. Crissie*, 4 Denio, 525.

BANK CHECK.

The representation that a bank check was good and genuine, and would be paid on presentation, when the drawer had no funds in the bank, is a false pretense. *Smith v. People*, 47 N. Y., 303; 1 Am. Cr. R., 210.

INTENTION TO RESTORE PROPERTY.

Where money is obtained from another by false pretenses, neither the intention or ability to repay will deprive the false and fraudulent act of its criminality. *Com. v. Coe*, 115 Mass., 481; 2 Green Cr. R., 292; *State v. Thatcher*, 35 N. J., 445; 1 Green Cr. R., 562.

FALSE PROMISES.

A false promise is not sufficient to maintain a conviction, but it must be a pretense, a representation in fact, that is false, and must be relied upon (*State v. Dows*, 27 Iowa, 275; 6 Mich., 496), while it is held under the Ohio statute that it is not essential to allege in the indictment that the prosecutor relied upon the representation. *Norris v. State*, 25 Ohio State R., 225.

FALSE PROMISES BLENDED WITH PRETENSE.

If both the false promise and pretense are blended together, it is within the law. 2 Bishop Cr. Law, Sec. 3551; *Com. v. Drew*, 19 Pick., 179; *State v. Dows*, 29 Iowa, 275.

INFERENCE.

A pretense may be gathered from the acts of a party. 2 Bishop, Sec. 355; *Com. v. Drew*, 19 Pick., 179; *State v. Dows*, 27 Iowa, 275.

PROCURING RECEIPT.

The procuring a receipt through a pretense of paying a debt and refusing to pay on receipt of the same, is within the statute. *State v. Dows*, 27 Iowa, 273.

FUTURE EVENTS.

Any representation as to any future events, though shown to be false, are not within the law, but must relate to a past event or existing fact. *Dillingham v. State*, 5 Ohio St., 283; *Com. v. Drew*, 19 Pick., 185.

PRUDENCE ON PART OF PROSECUTOR.

The prosecutor is bound to exercise common prudence and caution on his part (4 Hill, 12; 7 Johnson, 203), though not to an extraordinary extent. 1 Texas Cr. R., 314.

GIST OF THE OFFENSE.

The gist of the offense consists in procuring the goods of another by false pretenses and in representing himself to be in a condition in which he knows he is not. 11 Wend., 565; 14 Ib., 558; 25 Ib., 401; *Smith v. People*, 57 N. Y., 306; 12 Johnson, 292.

ILLEGAL ACTS.

Where the prosecutor parts with his property on representations of one for any illegal gains or purposes, the law gives him no relief. *McCorn v. People*, 46 N. Y., 472.

EVIDENCE—NOTARIAL PROTEST.

A notarial protest is not admissible as against a defendant to show that certain drafts which defendant pretended he had on a bank were protested, as he had a right to be confronted with his witnesses. *State v. Reidol*, 26 Iowa, 435.

INTENT.

Facts and circumstances rebutting any idea of intent are admissible. *People v. Getchell*, 6 Mich., 496.

The guilty intent may be shown by his acts, conduct, and declarations, after as well as before the commission of the act. *State v. Lewis*, 45 Iowa, 20.

CIRCULATING FOREIGN BANK NOTES.

SECTION 4047. If any person pay out, or offer to pay, or in any manner put in circulation, or offer to put in circulation, any bank note, bill, or other instrument intended to circulate as money issued or purporting to be issued by any bank, individual, or corporation elsewhere than in this state, excepting treasury notes, notes of any bank organized under the law of the United States, any other description of currency issued by the authority of congress, or notes of the branches of the state bank of Iowa, he shall be deemed guilty of a misdemeanor, and shall, upon conviction before any court having jurisdiction, be fined the sum of five dollars for each note, bill, or other instrument as aforesaid so paid out or offered to be paid out, put in circulation or offered to be put in circulation. In prosecutions under this section it shall not be necessary to state in the indictment or information the name of the bank issuing the notes, nor to prove the existence of the bank or other person purporting to issue the notes; but it shall be

66 COMPELLING TO MARRY—COMPOUNDING FELONIES.

sufficient to allege in general terms the fact of paying out, or attempting to pay out, as the case may be, of bank notes issued out of this state; and the proof may be made as if the particulars were alleged; and any number of offenses may be included in the same prosecution, provided that where the total fines alleged shall not exceed one hundred dollars, the offense shall be cognizable and may be tried before a justice of the peace and other co-ordinate jurisdictions; and when the total fines alleged exceed one hundred dollars, it shall be within the jurisdiction of the district court.

COMPELLING TO MARRY.

SECTION 3862. If any person take any woman unlawfully and against her will, and by force, menace, or duress, compel her to marry him or any other person, or to be defiled, he shall be fined not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding ten years. [Limitation, by section 4167, three years.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA, }
vs. } Compelling to marry.

The grand jury of the county of . . . , in the name and by the authority of the state of Iowa, accuse . . . of the crime of compelling a woman to marry him by force and against her will, as follows: The said . . . did on or about the . . . day of . . . 187 . . . in the county of . . . and State of Iowa, unlawfully and feloniously make an assault and put in danger of her life one S T, unlawfully and feloniously and by force and menace against her will, did compel her, the said S T, to marry him, the said A B, against her will, and contrary to and in violation of law.

A. B., *Dist. Att'y*, 8th District.

COMPOUNDING FELONIES.

SECTION 3951. If any person having knowledge of the commission of any offense punishable with imprisonment in the penitentiary for life, taking any money, or valuable consideration, or gratuity, or any promise therefor, upon an agreement or understanding, expressed or implied, to compound or conceal such offense, or not to prosecute the same, or not to give evidence thereof, he shall be punished by imprisonment in the penitentiary not more than six years, or by fine not exceeding one thousand dollars.

SEC. 3952. If any person having knowledge of the commission of any offense punishable by imprisonment in the penitentiary for a limited term of years is guilty of the offense described in the preceding section, he shall be punished by

imprisonment in the county jail not more than one year, and by fine not exceeding four hundred dollars. [Limitation, by section 4167, three years.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA, }
vs. } Compounding a Felony.

The grand jury of the county of Linn, in the name and by the authority of the State of Iowa, accuse . . . of the crime of compounding a felony, committed as follows: That heretofore, to-wit: on the . . . day of . . . at Marion, in the county of Linn, and State of Iowa, one E F did unlawfully, willfully and feloniously steal and lead away one iron-gray stallion, the property of one C D; and that the said C D, having a knowledge of the commission of said felony by E F, afterwards, to-wit: on the . . . day of . . . unlawfully and feloniously did exact, receive and take from the said E F the sum of fifty dollars, upon the express agreement and understanding that he, the said C D, would compound and conceal the felony of him, the said E F, and abstain from any prosecution therefor, or revealing the evidence thereof; and that in compliance with said agreement, he, the said C D, did, and from that time hitherto has, desisted and abstained from prosecuting him, the said E F, for said felony, contrary to and in violation of law, and against the peace and dignity of the State.

This same form will apply in an indictment under section 3952, with a few alterations.

ELEMENTS.

The gist of this offense is the concealing of the crime, and abstaining from prosecution, to the detriment of the public. If a man is induced to this by the promise of money, and actually takes an obligation for the money, everything necessary to constitute the crime seems to have been done. *Commonwealth v. Pease*, 16 Mass., 91.

PLEA OF BAR AND ACQUITTAL.

A party indicted for compounding a larceny, and agreeing to withhold evidence, cannot plead the acquittal of the person charged with larceny, in bar of his own conviction. *People v. Buckland*, 13 Wendell, 593.

CONSPIRACY.

SECTION 4086. If two or more persons conspire or confederate together, with intent, falsely and maliciously, to cause or procure another person to be indicted, or in any way impleaded or prosecuted for an offense of which he is innocent, whether such person be so impleaded, indicted, or prosecuted or not, they shall be deemed guilty of a conspiracy, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding

one thousand dollars nor less than one hundred dollars, and imprisonment in the county jail not exceeding one year.

SEC. 4087. If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character business, or property of another; or to do any illegal act injurious to the public trade, health, morals or police; or to the administration of public justice; or to commit any felony, they are guilty of a conspiracy, and every such offender, and every person who is convicted of a conspiracy at common law, shall be punished by imprisonment in the penitentiary not more than three years.

SEC. 4425. Upon a trial for a conspiracy, in a case where an overt act is required by law to constitute the offense, the defendant cannot be convicted unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved; but other overt acts not alleged in the indictment may be given in evidence.

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA, }
vs. } Conspiracy.

The grand jury of the county of Linn, in the name and by the authority of the state of Iowa, accuse . . . of the crime of a conspiracy. The said . . . in the county of . . . and state aforesaid, on the . . . day of . . . 187 . . . did then and there unlawfully, feloniously, wickedly and maliciously conspire and confederate together, with the fraudulent and malicious intent to injure the administration of public justice by unlawfully getting certain liquors, to-wit: one barrel of . . . out of the possession and control of one W. W. Moore, who was at the time a peace officer having the said liquor in his charge, and secreting the same so that it could not be had to be disposed of as might be finally adjudged and ordered on the hearing of said information. And the said J H and M F, with the intent and for the purpose aforesaid, did then and there unlawfully cause a writ of replevin to be illegally issued by one W C, a justice of the peace for Marion township, in said county, in favor of said J H, for said liquors, by means of which writ of replevin they, the said J H and M F, did get said liquors out of the possession and control of the said W. W. Moore, and did remove and secrete the same, so that they could not be had to be disposed of under the final judgment of forfeiture rendered by said G H, as such justice of the peace, on said information, nor the said order issued by the said G H, as such justice of the peace, on said judgment of forfeiture for the destruction of said intoxicating liquors, by reason of which said illegal, fraudulent and malicious acts of the said W H and M F, and of their conspiring and confederating together as aforesaid, great injury was done to the administration of public justice, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Iowa.

This form is approved in *State v. Harris and Folsom*, 38 Iowa, 243.

The following may be used where the conspiracy is the commission of a felony.

(Omitting formal part.) . . . did unlawfully and wickedly conspire, combine, confederate and agree together, in and upon one A B, then and there being, feloniously to make an assault, and him, the said A B, in bodily fear of some great injury to his person, then and there feloniously to put . . . , and the goods and chattels, moneys and property of the said A B, then and there feloniously and violently to rob, steal, take and carry away (if any act was done by the conspirators toward the offense, state it), against, etc.

This form is approved. *Elkin v. People*, 28 N. Y., 177.

INDICTMENT, INSUFFICIENCY OF.

To constitute a valid indictment, the particular circumstances of the offense must be charged, when they are necessary to constitute a complete offense. Where the indictment charged that the act was to be carried out, "with money and other unlawful means," it should state in what manner money was intended to be used, and specify more particularly the "other unlawful means." *State v. Potter*, 28 Iowa, 554; *State v. Jones*, 13 Iowa, 269; *Commonwealth v. East*, 1 Cush., 189 and 224; *Com. v. Shedd*, 7 Cush., 514; *State v. Roberts*, 34 Me., 321; *State v. Stevens*, 30 Iowa, 391. See, also, *Alderman v. The People*, 4 Mich., 414; *People v. Clark*, 10 Mich., 310.

A charge to injure the character of the prosecutrix, by obtaining a decree of divorce against her, on the ground of adultery, by procuring her to accept service of a notice, and of a false representation that the divorce was sought on other grounds, is held insufficient to warrant a conviction. *State v. Stevens*, 30 Iowa, 391.

A charge of an illegal act, injurious to the administration of public justice, must, if it be not shown that the act itself was criminal, particularly state the facts in regard to the means employed in order that it may be determined whether they were criminal. General averments, such as "by means of money and false promises," are not sufficient. *State v. Stevens*, 30 Iowa, 391; *People v. Clark*, 10 Mich., 310

CHARGING TWO OFFENSES.

To charge "did unlawfully and feloniously conspire to rob and steal from," etc., is not open to the objection that it charges more than one offense. *State v. Sterling*, 34 Iowa, 443.

ILLEGAL OR LEGAL ACTS BY ILLEGAL MEANS.

It must be alleged that the conspiracy was for the purpose of doing an illegal act, or a legal act by illegal means. *State v. Harris & Folsom*, 38 Iowa, 242. And the replevying liquors from the hands of an officer who holds them by virtue of a warrant of seizure is such an illegal act. *State v. Harris & Folsom*, 38 Iowa, 242; *People v. Clark*, 10 Mich., 310.

REAL AND PERSONAL PROPERTY.

An indictment lies for a conspiracy to cheat an individual of real estate as well as of personal property. *People v. Richards & Pelton*, 1 Mich., 216.

EVIDENCE, INTRODUCTION OF.

The proper order of proof is, first, to give evidence of the unlawful combination, and, afterward, to show the acts of the conspirators. *People v. Saunders*, 25 Mich., 119.

INDICTMENT, SUFFICIENCY OF.

It should appear on the face of the indictment for conspiracy that the object of the conspiracy was criminal, or that the means to be employed in obtaining it were criminal. The words "to cheat and defraud," without more, do not imply a criminal object, when alleged as the purpose of the conspiracy. *State v. Jones*, 13 Iowa, 270; *Alderman v. People*, 4 Mich., 414. See, also, *Com. v. Tibbits*, 2 Mass., 536; 9 Mass., 415.

THE OBJECT MUST BE CRIMINAL.

In the states of Maine, New Hampshire, Massachusetts, Vermont, New York, New Jersey, Pennsylvania, and now in Iowa, it is settled that a general charge of a conspiracy to affect an object not criminal is not sufficient, and that a charge of such conspiracy is to be accompanied with the further statements of the means agreed to be used to effect the object, and those means must appear to be criminal. *Stat. v. Jones*, 13 Iowa, on page 272; 1 Leading Cr. Cases, 264; 1 Cush., 189; *Com. v. Eastman*, 7 Cush., 514; *Com. v. Shedd*, 4 Met., 111; *State v. Roberts*, 24 Me., 320; *State v. Hewitt*, 31 Me., 386 and 396; 15 N. H., 396; 9 Cow., 578; 4 Hanstead, 293; 5 Barr., 60; *State v. Stevens*, 30 Iowa, 391; *State v. Harris & Folsom*, 38 Iowa, 242.

ELEMENTS.

In a prosecution for conspiracy to injure the property of another, evidence that the injury was done in the exercise of a legal right and without malicious or fraudulent intent, such as where the charge is to injure the dwelling house of one M. F., she being the wife of J. F., and living with him in the

house in question, a conviction cannot be sustained. *State v. Flynn*, 28 Iowa, 26; *State v. Stevens*, 30 Iowa, 391.

EVIDENCE, CIRCUMSTANTIAL.

This offense can be established by evidence purely circumstantial. *State v. Sterling*, 34 Iowa, 443; 1 Gr. Cr. R., 569.

MERGE.

A conspiracy to commit a felony, when executed, is merged in the felony. But a conspiracy to commit a misdemeanor is not merged in the misdemeanor. *People v. Richards & Pelton*, 1 Mich., 216.

EVIDENCE—DECLARATION OF CO-CONSPIRATOR.

The acts and declarations of a co-conspirator may, after sufficient proof of the fact of a conspiracy, be given in evidence to charge his fellow conspirator, subject always to the limitation that the acts and declarations admitted be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of the common object. Where the declarations are merely a narrative of a past occurrence, they cannot be received as evidence of such occurrence. They must be concomitant with the principal act and connected with it so as to constitute a part of the *res gesta*. This is upon the plain ground that the act and declaration of each in prosecution of the enterprise, and while engaged in accomplishing the common design, is to be considered the act and declaration of all, each being deemed the agent of all. *United States v. Gooding*, 12 Wheat., 460; *Am. Fur. Co. v. United States*, 2 Peters, 358; *Stetson v. City Bank of New Orleans*, 2 Ohio State, 167; *Patton v. State*, 6 Ohio St., 467. And this may even be done before proving a conspiracy. *People v. Brotherton*, 47 Cal., 388; 2 Gr. Cr. R., 444. To make an agreement between two or more parties to do an act innocent in itself a criminal conspiracy, it is not enough that the act is prohibited by statute, but the agreement must have been entered into with a criminal intent. *People v. Powell*, 63 N. Y., 88. Generally, see, *People v. Trequier*, 1 Wh. Cr. Cas., 142; *People v. Melvin*, Yates, S. C., 111; *People v. Fisher*, 14 Wendell, 9; 2 Daly 1; *Emmanuel's Case*, 6 C. H. Rec., 33; 2 O. H. Rec., 61; *Lumbert v. People*, 9 Cow., 578;

7 Ib., 166; *People v. Eckford*, 7 Cow., 535; *People v. Olcott*, 2 Johns' Cases, 301; *People v. Mather*, 4 Wend., 229; 2 Wheeler's Cr. Cases, 617; Roscoe's Cr. Ev., 7th edition, pages 92 and 409; *State v. Crowley*, 41 Wis., 271; 22 Am. R., 719; *State v. Green*, 7 Wis., 676; *Commonwealth v. Hunt*, 4 Met., 123; 1 East's P. C., 461; 9 Cow., 586; *McCord v. The People*, 46 N. Y., 470; *People v. Stetson*, 4 Barb., 151; *People v. Clough*, 17 Wend., 351; *Com. v. Morrill*, 8 Cush., 571; *Com. v. Harris*, 22 Penn. St. (10 Harris), 253.

CORRUPT SOLICITATION.

SECTION 3942. If any person, directly or indirectly, give, offer, or promise any valuable consideration or gratuity to any other person not being such officer as is mentioned in the preceding section, with intent to induce such other person to procure for him by his interest, influence, or any other means whatever, any place of trust within this State, he shall be punished by fine not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year. [Limitation, by section 4167, three years.]

Form of Indictment under Sec. 4157.

District Court of County.

THE STATE OF IOWA, }
vs. } Corrupt Solicitation.

.
The grand jury of the county of . . . in the name and by authority of the State of Iowa, accuse . . . of the crime of corrupt solicitation to bribe an officer, committed as follows: Said . . . on or about the . . . day of . . . , 187 . . . , within the county of . . . and State aforesaid, did, wickedly, advisedly, corruptly, and feloniously solicit, urge and endeavor to procure T C, he, the said T C, then and there being the chairman of the Board of Supervisors for Linn county, and then and there employed in the execution of the duties of said office, to receive proposals for contracting to build an addition to a certain building known as the "Fire Proof Building," the same being the property of said county, and in order to prevail upon him, the said T C, to agree to give him, the said R W, the preference in and the benefit of such contract, he, the said R W, then and there did wickedly, advisedly, feloniously and corruptly offer to give the said T C, then and there being the chairman of the "Board of Supervisors" as aforesaid, a large sum of money, to-wit: the sum of two hundred dollars, as a bribe, present and reward, in contempt of the laws, and to the evil example of others in the like case offending, and contrary to and in violation of law.

SEC. 3943. If any person, not being such officer as is referred to in the preceding sections of this chapter, accept and receive of another any valuable consideration or gratuity whatever as a reward for procuring, or attempting to procure, any office or place of trust within this State for any person, he shall be punished by fine not exceeding three hundred

dollars and imprisonment in the county jail not exceeding one year. [Limitation, by section 4167, three years.]

SEC. 3945. If any person summoned, appointed, or sworn as a juror; or appointed arbitrator, umpire, or referee; or master in chancery; or auditor; or appraiser as aforesaid, take or receive any valuable consideration, or gratuity whatever, to give his verdict, award, or report in favor of any particular party, in a matter for the hearing or decision of which such person has been summoned, appointed, or chosen as aforesaid, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

SEC. 3946. If any person attempt to improperly influence any juror in any civil or criminal cause, or any one drawn, or summoned, or appointed, or sworn as such juror, or any arbitrator or referee, in relation to any cause or matter pending in, or to be brought before, the court for which such juror has been drawn, summoned, appointed or sworn; or for the hearing and decision of which such arbitrator or referee has been chosen or appointed, he shall be punished by a fine not exceeding five hundred dollars, and by imprisonment in the county jail not more than six months.

SEC. 3947. If any person drawn, summoned, or sworn as a juror, make any promise or agreement to give a verdict for or against any person in any civil or criminal case, or corruptly receive any paper, evidence, or information from any one in relation to any matter or cause for the trial of which he is sworn, without the authority of the court or officer before whom such cause or matter is then pending, he shall be punished by a fine not exceeding two hundred dollars, or imprisonment in the county jail not exceeding three months.

SEC. 3948. If any sheriff, deputy sheriff, constable, or coroner, receive from a defendant, or any other person, any money or other valuable thing as a consideration or inducement for omitting or delaying to arrest any defendant, or to carry him before a magistrate or to prison; or for postponing, delaying, or neglecting the sale of property on execution; or for omitting or delaying to perform any other duty pertaining to his office, he shall be punished by fine not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or by both fine and imprisonment, at the discretion of the court.

The limitation, to the above five sections, is by section 4167 three years; and a similar form of indictment to the one under section 3942, first given, may be used, with the proper changes.

COUNTERFEITING MARK OF ANOTHER.

SECTION 4079. If any person counterfeit any mark, stamp, or brand of another, or falsely mark any cask, package, box, or bale, as to quality or quantity, with intent to defraud, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not more than six months, or by both fine and imprisonment. [Limitation, by section 4167, three years.]

For form, see title "Altering Brands, Stamps and Marks."

CONTEMPTS.

SECTION 3491. The following acts or omissions are deemed to be contempts, and are punishable as such by any of the courts of this state, or by any judicial officer acting in the discharge of an official duty, as hereinafter provided:

1. Contemptuous or insolent behavior towards such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority;

2. Any willful disturbance calculated to interrupt the due course of its official proceedings;

3. Illegal resistance to any order or process made or issued by it;

4. Disobedience to any subpoena issued by it and duly served, or refusing to be sworn, or to answer as a witness;

5. Unlawfully detaining a witness or party to an action or proceeding pending before such court, while going to or remaining at the place where the action or proceeding is thus pending;

6. Any other act or omission specially declared a contempt by law;

SEC. 3492. In addition to the above, any court of record may punish the following acts or omissions as contempts;

1. Failure to testify before a grand jury, when lawfully required to do so;

2. Assuming to be an officer, attorney, or counselor of the court, and acting as such without authority;

3. Misbehavior as a juror, by improperly conversing with a party, or with any other person in relation to the merits of an action in which he is acting or is to act as a juror, or receiving a communication from any person in respect to it without immediately disclosing the same to the court;

4. Disobedience by an interior tribunal, magistrate, or officer, to any lawful judgment, order or process of a superior court, or proceeding in any matter contrary to law, after it has been removed from such tribunal, magistrate, or officer.

SEC. 3493. The punishment for contempts may be by fine or imprisonment, or both, but where not otherwise specially provided, courts of record are limited to a fine of fifty dollars, and an imprisonment not exceeding one day, and all other courts are limited to a fine of ten dollars.

SEC. 3494. But if the contempt consists in an omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he performs it. In that case the act to be performed must be specified in the warrant of the commitment.

SEC. 3495. Unless the contempt is committed in the immediate view and presence of the court, or comes officially to its knowledge, an affidavit showing the nature of the transaction is necessary as a basis for further action in the premises.

SEC. 3496. Before punishing for contempt, unless the offender is already in the presence of the court, he must be served personally with a rule to show cause against the punishment, and a reasonable time given him therefor; or he may be brought before the court forthwith, on a given day, by warrant, if necessary.

SEC. 3498. When the offender is committed, the warrant must state the particular facts and circumstances on which the court acted in the premises, and whether the same was in the knowledge of the court, or was proved by witnesses.

SEC. 3499. No appeal lies from an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari.

SEC. 3500. The punishment for a contempt constitutes no bar to an indictment; but if the offender is indicted and convicted for the same offense, the court in passing sentence must take into consideration the punishment before inflicted.

SEC. 3501. Any officer authorized to punish for contempt, is a court within the meaning of this chapter.

In cases of contempt, unless the same is committed in the immediate presence of the court, or comes officially to its knowledge, an affidavit showing the nature and acts complained of as having been done is necessary as a basis of the proceeding against a person. The return on a subpoena and a failure of the witness' appearance when called, will bring the matter officially before the court, except where the subpoena is served by leaving a copy, together with the fees, at the witness' usual place of residence, in which case he is not liable for a contempt, unless it is shown by affidavit that the copy, with the proper fees, came into the hands of the witness in time to appear and testify in the case. Code, Sec. 3495. Where

the person is guilty of, or charged with, an act which is a contempt, not committed in the presence of the court, the offender must be served with rule as provided in Sec. 3496, which may be in the following form:

THE STATE OF IOWA,

To the Sheriff of . . . County:

WHEREAS, on the . . . day of . . . 1878, a subpoena was issued from the . . . court, in and for Linn county, at the request of J S, requiring L S to be and appear before said court, at . . . , on the . . . day of . . . 1878, then and there to testify on behalf of the . . . , in an action pending in said court, wherein said J S was (or) is plaintiff, and S M was (or is) defendant, which subpoena was duly served by . . . , a . . . of Linn county, Iowa, on the said L S, on the . . . day of . . . 1878 (no fees being demanded); and whereas, on the said day . . . 1878, and hour the said L S was duly called in open court as such witness, but failed to appear in any manner.

You are therefore commanded to make known to the said L S that he be and appear before the said court, on the . . . day of . . . 1878, to show cause, if any he has, why he should not be punished according to law, for contempt of court (which must be signed by the clerk with the seal attached or by the justice).

If it is desired to bring the witness forthwith before the court, then add in the command to the sheriff "you are therefore commanded to attach the said L S, and bring him before the court forthwith to answer for a contempt of court in not appearing to testify in obedience to said subpoena."

Form of Conviction for Contempt.

STATE OF IOWA
VS.

Contempt.

WHEREAS, heretofore, on the . . . day of . . . 1878, a subpoena issued from this court, and was duly served on the defendant, L S, on the said day, commanding him to appear before . . . , on the . . . day of . . . 1878, to testify in a certain cause then pending before said court on part of the plaintiff, in an action then pending, wherein J S was plaintiff and S M defendant; and whereas, it appears to the court that the defendant was regularly and duly served; and whereas, the said L S, on the day of trial was duly called to then and there testify, but failed in any manner to appear; and whereas, on the . . . day of . . . 1878, on motion of plaintiff, a rule was issued on said defendant, requiring him to appear forthwith before said court, to show cause why he should not be punished for contempt of court in the disobedience to said subpoena, which rule was duly served on the defendant and a return made (or if the acts were committed in presence of the court, then recite the words or acts done in which no rule is required to be served). And now, on this . . . day of . . . 1878, the said L S, appearing in person and by counsel, and failing to show sufficient excuse for disobeying said subpoena (or for using the abusive, insulting language and conduct towards the court above set out), it is considered and adjudged that the said L S is guilty of a contempt of this court, and it is therefore ordered that he pay a fine of . . . , and pay the costs of this proceeding. (If the contempt is for refusing to testify or comply with some order of court, such fact must be recited and the order should be in that case after the record imposing the fine, if any, direct, as follows): And it is further ordered that the said L S be imprisoned in the county jail until he shall express his willingness to testify and give evidence in said cause, and that a warrant issue for the execution of this order.

Form of Warrant of Commitment.

THE STATE OF IOWA,

To the Sheriff of . . . County.

WHEREAS, on the . . . day of . . . 1878, by an order made by the . . . court, L S was convicted of a contempt of court for disobedience of the lawful process of said court (or whatever the facts are):

You are therefore ordered to take said L S and keep him in your custody in the

county jail for the period of (or in case of refusal to testify, state as follows), until the said L S shall express his willingness to testify and give his evidence in . . . (naming the cause), and when he shall express his willingness so to do, that you bring him into court or detain him until he be legally discharged.
Signed this . . . day of . . . etc.

Form of Attachment for Contempt in Disobeying a Writ of Habeas Corpus.

THE STATE OF IOWA,

To the Sheriff of . . . County.

WHEREAS, it appears satisfactorily to me that M N, to whom a writ of *habeas corpus* was delivered, commanding him to have the body of . . . in said writ named, before me at . . . , on etc., to be dealt with according to law, has failed and neglected to obey said writ as directed by not producing and bringing the said . . . before me, and by not making any return to said writ, you are therefore commanded forthwith to arrest the said . . . , and bring him immediately before me, at . . . , etc., to be dealt with according to law.

And you are further ordered to bring up and have before me at said time and place, the body of the said . . . , who is alleged to be illegally restrained of his liberty by the said L S, at . . . , etc., to be dealt with as by law provided.

(If the attachment is issued by order of the court, the clerk must sign it and attach the seal of the court, if issued by the judge in vacation he signs without any seal.)

Form of Warrant of Commitment.

THE STATE OF IOWA,

To the Sheriff of . . . County.

WHEREAS, L S has been brought before me on an attachment for contempt issued by me (here state the contempt); and whereas, the said L S still refuses to produce the body of the said . . . , according to the command of said writ, and refuses to make a plain and unequivocal return and answer to said writ of *habeas corpus* :

You are therefore commanded to take the said . . . and him safely keep in the jail of . . . county, until he shall comply with said writ of *habeas corpus*, or until he is otherwise legally discharged. (To be signed by the clerk or judge as the case may be.)

CONTEMPTS ARE OF TWO KINDS.

Contempts are of two kinds, direct and constructive. A direct contempt is one offered in the presence of the court while setting judicially; a constructive contempt is one which tends to obstruct and embarrass a court, though the act be not done in its presence. *Stuart v. The People*, 3 Scam. (Ill.), 395; *People v. Wilson*, 64 Ill., 195; 16 Am. R., on page 542; 1 Am. Cr. R., 107; *Reg v. Skipworth*, 12 Cox's Crim. Cases, 361; 1 Green's Cr. R., 121.

IS AN INHERENT AND NECESSARY POWER.

The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of courts, and to the due administration of justice. *Ex parte v. Robinson*, 19 Wallace, 505; 2 Green's Cr. R., 135; *Watson v. Williams*, 36 Miss., 33; *State v. Mathews*, 37 N. H., 451; *Brown v. Brown*, 4 Ind., 627; *Loveland v. Jones*,

Ib., 184; *State v. Tipton*, 1 Blackf., 166; *Ex parte Grace*, 12 Iowa, 209; 2 Iowa, 71; 2 Ib., 551.

IS A CRIMINAL PROCEEDING.

The right of liberty is also subject to restriction as a punishment for contempts of court which may, without impropriety, be classed with crimes. Hurd on Habeas Corpus, 2d ed., page 7. And every proceeding to punish for contempt is a criminal proceeding. 4 Blackstone's Com., 283, 284; *Passmore Williams' Case*, 26 Penn. St. R., 9; *State v. Mathews*, 37 N. H., 450; *In the matter of E. B. Peyton*, 12 Kansas, on page 405; *Whittem v. State*, 36 Ind., 196; *McConnell v. State*, 46 Ib., 298; *State v. Cutler*, 13 Kansas, on page 144. But not to that extent as to deny the right to punish by courts though not having criminal jurisdiction in criminal cases. *Middlebrook v. State*, 43 Conn., 257; 21 Am. R., 650.

JURY TRIAL NOT ALLOWABLE.

The power to punish for contempt without the intervention of a jury is inherent, and the exercise of this power is not in conflict with the constitution, which provides that, "the right of trial by jury shall remain inviolate." *Ex parte Grace*, 12 Iowa, 209. It can hardly be possible that it was ever intended that in any case for contempt a trial shall be had by a jury. *State v. Cutler*, 13 Kansas, 131.

JURISDICTION.

In matters of contempt, when a court having jurisdiction of a cause is proceeding to arrest a party for contempt, no other court can intermeddle with or stay the proceedings, or release the party on *habeas corpus*. *Ex parte Holman*, 28 Iowa, 88. But if the order alleged to have been violated was made without jurisdiction, no one is liable for contempt. *Haines v. Haines*, 35 Mich., 143.

EVERY COURT IS SOLE JUDGE.

In matters of contempt every court is sole judge of its orders and authority. *Ex parte Holman*, 28 Iowa, 88. The sole adjudication of contempts, and the punishment thereof in any manner, belongs exclusively and without interference to each respective court. 2 Iowa, 70; *Ex parte Kearney*, 7 Wheat., 41; *Leavenworth v. Tipton*, 1 Blackf., 166; *Yeates' Case*, 4

Johnson, 354; *Johnson v. Commonwealth*, 1 Bibb., 598; *Wyatt v. Magee*, 3 Ala., 94; *Ex parte Passmore Williams*, 26 Penn. St. R., 9; *Robb v. McDonald*, 29 Iowa, 330.

FEDERAL AND STATE COURTS.

Federal courts or judges cannot discharge persons from custody, under process for contempt, issued by a state court in the course of a suit pending therein, even though it relates to property of Indians, over which, under special treaties and acts of Congress, such state court has no jurisdiction. *Ex parte Forbes*, 1 Dillon's Circuit Court R., 363.

JUSTICE OF THE PEACE.

A justice has the power to punish for contempt a person refusing to answer a subpoena, or refusing to be sworn, etc. *Robb v. McDonald*, 29 Iowa, 330; 4 Am. R., 211; Whitcomb's Case, 120 Mass., 118; 21 Am. R., 502; Clarke's Case, 12 Cush., 820; *Piper v. Pearson*, 2 Gray, 120; *State v. Copp*, 15 N. H., 212; *In re Cooper*, 32 Vt., 253.

RECORDS SHOULD CONTAIN.

Where the action of the court is founded upon evidence given by others, such evidence must be reduced to writing and be filed and preserved. Code, Sec. 3497; *Skiff v. State*, 2 Iowa, 551; *Whitem v. State*, 26 Ind., 196, 213; *McConnell v. State*, 46 Ib., 298; 2 Green's Cr. R., 723.

WITHIN THE KNOWLEDGE OF COURT.

Where the court acts upon its own knowledge in the premises, such as where the contempt, if any, was committed in the presence of the court, a statement of the facts, containing the acts for which the punishment is sought to be enforced, must be made a matter of record. *Skiff v. State*, 2 Iowa, 551; Code, Sec. 3497; *State v. Utley*, 13 Iowa, 593; *State v. Dougherty*, 32 Iowa, 261; *State v. Mathews*, 37 N. H., 450.

CUSTODY—ARREST WITHOUT WARRANT.

Where a contempt is committed in the presence of the court, the offending party may be ordered into custody without a warrant, but a record of the offense and the arrest should immediately be made. *State v. Mathews*, 37 N. H., 450.

DEFENDANT ENTITLED TO TIME TO ANSWER.

A party who is in contempt of court is entitled to a reasonable time before punishment in which to prepare and file his answer as an explanation. *State v. Duffey*, 15 Iowa, 425; *Steller v. Steller*, 25 Mich., 159.

MUNICIPAL CORPORATIONS AND POWERS.

It is universally admitted that by the law of England a town or city council had no power, without express act of parliament, to make an ordinance with penalty of imprisonment or to commit for contempt of its authority. *Grant on Corp.*, 84-86; 4 *Moore's P. C.*, 89; *Barter v. Commonwealth*, 3 Penn., 253.

A CITY COUNCIL IS NOT A LEGISLATURE.

It has no power to make laws, but merely to pass ordinances upon such local matters as the legislature may commit to its charge. Neither branch of a city council is a court, or, in accurate use of language, vested with any judicial functions whatever. To allow such a body to punish summarily by imprisonment, the refusal to answer any inquiry which the whole body, or one of its committees may choose to make, would be a most dangerous innovation of the rights and liberties of the citizen. *Anderson v. Dunn*, 6 Wheat., 233, 234; 12 *Cokes R.*, 75; *Whitcomb's Case*, 120 Mass., 118; 21 Am. R., 502.

LEGISLATIVE BODIES HAVE POWER TO PUNISH.

The power doubtless exists in each branch of the General or State government to punish for contempts. *Anderson v. Dunn*, 6 Wheat., 204; *Burnham v. Morrissey*, 14 Gray, 226; *State v. Mathews*, 37 N. H., 450; *Falvey's Case*, 7 Wis., 630; *Whitcomb's Case*, 120 Mass., 118; 21 Am. R., 502.

NOTARY PUBLIC'S POWER TO PUNISH.

It is held in Kansas that where a witness refuses to give his deposition when duly notified is in contempt, and a *notary* has the power to punish, and commit for contempt. *In matter of Abeles*, 12 Kansas, 451.

WHAT ARE CONTEMPTS—PUBLICATION OF NEWSPAPER ARTICLES.

The publication by an attorney of an article in a newspaper criticising the rulings of the court in a cause tried and determined prior to the publication, does not constitute contempt.

uous or violent behavior toward the court, punishable as a contempt. Whether the publication, if made during the pendency of the trial, would justify the court in punishing the writer for contempt, *quære*. *Dunham v. State*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207; 3 Wheeler's Cr. Cases, 1. To say that "the prisoner will get a new trial," and eventually escape justice, because \$1,400 is enough now-a-days to purchase immunity from the consequences of any crime," and that "the courts are now completely in the control of corrupt and mercenary shysters, the jackals of the legal profession, who feast and fatten on human blood, spilled by the hands of other men," is a contempt and calculated to embarrass and obstruct the administration of justice. *People v. Wilson*, 64 Ill. R., 195; 1 Am. Cr. R., 107.

ALL ACTS TENDING TO OBSTRUCT IS CONTEMPT.

All acts calculated to impede, embarrass or obstruct the administration of justice, should be considered as in the presence of the court, and are contempts. *People v. Wilson*, 64 Ills. R., 195; *Dunham v. State*, 6 Iowa, 245; *State v. Morrill*, 16 Ark., 384; *Story v. People*, 79 Ill., 45; 22 Am. R., 158.

IN REGARD TO CASES ENDED.

It seems to be conceded as a well settled principal of law, that the court has no right to punish any criticism on its decisions, or official conduct in regard to cases that are ended, so long as its action is correctly stated and its official integrity is not impeached. *Dunham v. State*, 6 Iowa, 245; *People v. Wilson*, 64 Ill., 195; 1 Am. Cr. R. 107; 16 Am. R. 528.

PUBLISHER'S KNOWLEDGE OF ARTICLE.

The proprietor of a newspaper may be punished for contempt for an article published in the newspaper owned by him, although such article was published without his knowledge and consent, when to a rule to show cause he makes no defense as to matters of fact, except that he did not know or sanction it before publication. *People v. Wilson*, 64 Ill., 195; 1 Am. Cr. R., 107; 16 Am. R., 528.

MANAGING EDITOR, LIABILITY OF.

The managing editor of a newspaper may be punished for contempt for permitting the publication of a newspaper

article, which although not written by him, was seen by him before publication, and which he had power to exclude from the paper. *People v. Wilson*, 64 Ills., 195; 1 Am. C. R., 107; 16 Am. R. 528.

CONTENTS OF A PETITION.

The employment of abusive and impertinent language toward the court in a petition signed by the party, and filed with the clerk, is a ground for an attachment to show cause of contempt. *State v. Keene*, 6 La., 375; *State v. Redmond*, 9 La., 319.

TOWARDS A JUDGE DURING RECESS.

Where the judges had taken a recess and during this time the defendant approached the Chief Justice, and used toward him abusive language and assaulted him, it was held a contempt. *State v. Garland*, 25 La., 532.

PROPOSITIONS TO JURORS.

A proposition to a juror to signal from a window of the jury room how the jury stand with regard to their verdict, is a contempt. *State v. Doty*, 3 Vroom, 32 N. J., 403.

JUSTICE REFUSING TO CERTIFY RECORDS.

The refusal of a justice of the peace to amend his return to a writ of *certiorari* when required so to do, is a contempt. *Talbot v. White*, 1 Wis., 444.

WITNESS BEFORE GRAND JURY.

The examination of a witness before a grand jury is a proceeding upon an indictment, and the refusal to answer a proper question is a contempt. *People v. Hackley*, 24 N. Y., 74.

REFUSAL GENERALLY.

To refuse to testify may be a contempt. *Lockwood v. State*, 1 Ind., 161.

FAILURE TO APPEAR IN A CRIMINAL CASE.

A witness was subpoenaed to appear at the term of court in a criminal case, but failed to appear: *Held*, the witness being in contempt could have been brought before the court upon a warrant returnable at a given day, and this may be at

a subsequent term of the court, or the arrest may be made at any time, if the case require it. But the court may direct the witness released on bail, if arrested before return day. These proceedings, however, must only be had in a case of actual contempt. The issuing of such writ rests in the sound discretion of the court.

DISCRETION OF JUDGE.

Where the record does not show that this discretion in refusing to issue the writ was abused by the court below, the presumption is that the necessity for such arrest and requiring bail to be given was not made to appear to the court, or that the witness could be arrested at the next term of court. *State v. Archer*, Western Jurist, June No., 1878, p. 378.

DISREGARDING ORDER OF COURT.

If a witness disregards the order of the court, to remain out of the court room while another witness testifies, he is guilty of contempt. *Grimes v. Martin*, 10 Iowa, 347; *Davenport v. Ogg*, 15 Kansas, 366.

EFFECT OF VIOLATING ORDER.

While a witness may be in contempt for remaining in court room against an order of court, and may effect his credibility, it does not render him incompetent. *Grimes v. Martin*, 10 Iowa, 347; *Davenport v. Ogg*, 15 Kansas, 366; *Keith v. Wilson*, 6 Mo., 435; *State v. Salge*, 2 Nev., 321; *Gregg v. State*, 3 W. Va., 705; *Bell v. State*, 44 Ala., 393; *State v. Sparrow*, 3 Murphy (N. C.), 487; *Hopper v. Commonwealth*, 6 Grat., Va., 684.

PRACTICE—POWER OF COURT—ORDER.

The district court has no power to order a party to deliver to the sheriff the key of a safe which, with the contents, the party claims as his own property, and upon his refusing to obey the order, to fine him for contempt. *State v. Start*, 7 Iowa, 501.

APPEAL—CERTIORARI.

Under section 1606, Code, 1851, "No appeal lies to an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by *certiorari*,"

the same being incorporated into section 2696, Rev. 1860, and section 3499, Code, 1873. Under this law it is held that no appeal lies but *certiorari* only. *Dunham v. State*, 6 Iowa, 245. No appeal lies unless by statute authorizing it, in cases of contempt, and there seems to be no statute to that effect in Indiana (*Hunter v. State*, 6 Ind., 243; *Haines v. Haines*, 35 Mich., 139), while in Michigan an appeal is allowed.

JUSTICE'S JUDGMENT, HOW REVIEWED.

The judgment of a magistrate punishing for contempt can only be reviewed on *habeas corpus* so far as to see whether he had jurisdiction. *State v. Towle*, 42 N. H., 540. But under statutes like Iowa, the proceedings in contempt of a justice of the peace are reviewed on *certiorari*.

Section 3216, Code, 1873: The writ of *certiorari* may be granted whenever specially authorized by law, and especially in all cases where an *inferior* tribunal, board or officer exercising judicial functions, is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, when in the judgment of the superior court there is no other plain, speedy and adequate remedy.

Section 3224. No writ shall be granted after twelve months have elapsed from the time the inferior court, tribunal board or officer has, as alleged, exceeded his proper jurisdiction, or has otherwise acted illegally.

IMPRISONMENT.

While a debtor cannot be imprisoned for a debt, he may be imprisoned for the violation or refusal of an order of the court. *Steller v. Steller*, 25 Mich., 159.

These sections are applicable to justice's courts, and the writ of *certiorari* extends to their courts as well as others in matters of contempt for the purpose of reviewing its proceedings.

WHEN AFFIDAVIT NOT REQUIRED.

Where, the defendant and the grand jury both being present in open court, it is stated on the part of the latter, that the defendant has declined to answer a question before them, and he thereupon does not deny, but justifies his refusal, and reiterates the same, the contempt is in the immediate view and

presence of the court; an affidavit is not necessary to a commitment. *People v. Hackley*, 24 N. Y., 74.

WITNESS HELD ON CONTEMPT, DISCHARGE OF.

Where a witness is committed until he shall consent to answer, he is entitled to discharge when the proceeding or cause of action in which he was subpoenaed is dismissed. *In matter of Hall*, 10 Mich., 210.

APPEARANCE IN PERSON OR BY ATTORNEY—TRIAL.

On a rule to show cause why an attachment should not issue against the defendant for a contempt, if he relies on an excuse only, he should appear in person. If he appear by attorney and defend on legal grounds, an excuse can only be regarded in mitigation of punishment, and not as ground for discharging the rule. *People v. Wilson*, 64 Ill., 195; 1 Am. Cr. R., 107. But where the defendant absents himself with a view of being beyond the reach of court, the court may proceed without his presence and enter judgment. *Middlebrook v. State*, 43 Conn., 257; 21 Am. R., 650.

FORMER ADJUDICATION—BAR.

A punishment for contempt is no bar to a prosecution for a breach of the peace or commission of a crime. 43 Conn., 257; 21 Am. R., 650; 4 Johnson, N. Y., 317; 9 Ib., 395.

PURGING OF CONTEMPT—ANSWER.

Until a defendant held to be in contempt has purged himself of the contempt, by obeying the orders of court, made absolute against him, the court may refuse to receive such parties pleading. *Saylor v. Mackbie*, 9 Iowa, 209.

DISMISSAL OF SUIT, RIGHT TO.

The mere failure to comply with the order of court does not of itself so put a plaintiff in contempt as to prevent him from dismissing his suit on payment of costs. *Smith v. Smith*, 2 Blackf., 232.

DEFENSE—EXCUSE—JUSTIFICATION.

It is no defense to a proceeding in contempt to claim that the witness was not bound to answer the question propounded to him. It is for the court and not the witness to determine whether an answer would criminate him. *State v. Duffy*, 15

Iowa, 425; *People v. Mather*, 4 Wendell, 230; 6 Cowan, 254-255. Neither can a peace officer be excused when the question involves only facts of recent occurrence; the answer cannot criminate the witness. *Hunt v. McCalla, sheriff*, 20 Iowa, 20.

INSUFFICIENT EXCUSE.

It is not a sufficient excuse, nor does it furnish any ground for releasing, for the reason that the affidavit desired by the party at whose instance the subpœna was issued, would not be legally admissible in the proceeding pending in another forum; this the court must determine and not the witness. *Robb v. McDonald*, 29 Iowa, 330; 4 Am. R., 211.

ANSWER—DISCHARGE, EFFECT OF ON TRIAL.

In all cases of proceedings for alleged constructive contempt, except, perhaps, when they are to enforce a civil remedy, if the party charged fully answers all the charges against him, he shall be discharged as to the attachment, and the court cannot, after that, hear evidence to impeach or contradict him. 4 Black. Com., 286; *Saunders v. Melhuish*, 6 Mod., 73; 1 Yeates, 40; *In the Matter of Moore*, 63 N. C., 397; *United States v. Dodge*, 2 Gallis, 313; *People v. Few*, 2 Johns., 290; *State v. Earl*, 41 Ind., 464; 2 Green's Cr. R., 680.

DEFENSE, EXCUSE SUFFICIENT.

Until a party has been subpœnead to attend before a grand jury, or a subpœna has been issued for him, it is not a contempt of court for a person to induce him to absent himself in order that he may not be subpœnaed. *McConnell v. State*, 46 Ind., 298; 2 Green's Cr. R., 723.

EXCUSE—NON-PAYMENT OF ALIMONY.

Where an order has been made by a court for the payment of alimony in an action, a party failing to pay the same is not in contempt unless a proper demand of payment and refusal is shown. *Brown v. Brown*, 22 Mich., 299.

INABILITY TO PAY.

If it appear that the debtor is unable to pay the sum ordered to be paid, that may be deemed a sufficient excuse when he appears to answer for apparent contumacy, as he cannot be adjudged to be in contempt of an impossibility.

Ex-parte Cohen, 6 Cal., R., 318; in *Myers v. Trimble*, 3 E. D. Smith, 612; *Galland v. Galland*, 44 Cal., 475; 13 Am. R. 167.

SENTENCE—PRESENCE OF DEFENDANT.

A sentence for contempt committed in the presence of the court is valid, though pronounced in the absence of the offender. *Middlebrook v. State*, 43 Conn., 257; *State v. Taff*, 39 Conn., 82; 21 Am. R., 650.

CRUELTY TO ANIMALS BY TORTURING, ETC.

SECTOIN 4031. If any person torture, torment, deprive of necessary sustenance, cruelly beat, mutilate, cruelly kill, or overdrive any animal, or unnecessarily fail to provide the same with proper food, drink, shelter, or protection from the weather, or cruelly drive or work the same when unfit for labor, or cruelly abandon the same, or carry or cause the same to be carried on any vehicle, or otherwise, in an unnecessarily cruel and inhuman manner, he shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars. [Limitation, by section 4168, one year.]

Form of Information.

THE STATE OF IOWA, }
vs. } Before . . . , a justice of Linn Co., Iowa.
Information.

The defendant is accused of the crime of torturing an animal: For that the said defendant, on the . . . day of . . . , 187 . . . in the township of . . . county of . . . and state of Iowa, unlawfully, maliciously and cruelly did beat a certain horse, of the property of him, the said . . . , contrary to and in violation of law.

Or, unlawfully, maliciously and cruelly did wound a certain cow, the property of one C D, by striking and cutting the said cow on the back with an ax, contrary, etc.

Or, a certain living creature, to-wit., a horse, did then and there unlawfully and unnecessarily overdrive and greatly injure, contrary, etc.

INDICTMENT—INFORMATION.

Under the Texas statute for the protection of dumb animals, the indictment or information need not allege the owner's name of the animal, but when alleged it must be proven. *Rose v. The State*, 1 Texas Court of Appeals, 400.

AVERMENT OF OWNERSHIP.

It is held under the laws of Alabama not to be necessary to allege the name of the owner of the animals injured. *State v. Pierce*, 7 Ala., 723.

An indictment for malicious mischief in wounding and cruelly beating animals, which omits to name the owner of the

animal is insufficient. *State v. Smith*, 21 Texas, 748. But under the Mass. statute it need not be alleged that the horse was the property of any person, or describe the horse. *Com. v. McClellan*, 101 Mass., 34. So a complaint for killing a deer, alleging that the defendant "did drive, worry and kill a live animal called a deer," is not bad for duplicity. *State v. Norton*, 45 Vt., 258.

See also title "Killing, Maiming and Disfiguring Stock."

CRUELTY TO INSANE PERSONS.

SECTION 141b. Any person having care of an insane person, and restraining such person either with or without authority, who shall treat such person with wanton severity, harshness or cruelty, or shall in any way abuse such person, shall be guilty of a misdemeanor, besides being liable in an action for damages.

CARE OF THE INSANE, CHAPTER V, TITLE 11.

SECTION 1445. Any officer required herein to perform any act, and any person accepting an appointment under the provisions of this chapter, and willfully refusing or neglecting to perform his duty as herein prescribed, shall be guilty of a misdemeanor, besides being liable to an action for damages. [Limitation, by section 4167, three years.]

DISCHARGING FIRE ARMS NEAR ENCLOSED STOCK.

SECTION 3900. Any person who knowingly discharges fire arms of any description within, or in the immediate vicinity of, any enclosure where cattle, hogs or sheep are being fed for the purpose of fattening the same, or any person who enters such enclosure with fire arms, or dog, unless such person shall be the owner of said stock, or have the control of the same, or shall have permission from such owner or the person having control thereof to enter said premises, shall be guilty of a misdemeanor. [Limitation, by section 4167, three years.]

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA, } In District Court of . . . County, . . . Term, 187 .
VS. } *Indictment.*

vs.

Indictment.

The grand jury of the county of . . . , in the name and by the authority of the

State of Iowa, accuse . . . of the crime of discharging fire arms near stock yards, committed as follows: That the said . . . on the . . . day of . . . 187 . . . in . . . county, Iowa, then and there being in the immediate vicinity of, and close proximity to a certain stock yard, wherein a large number of cattle, to-wit., forty-five head, of the property of one C D. were being kept for the purpose of fattening, did willfully, knowingly and unlawfully discharge a certain fire arm, to-wit., a certain shot gun, contrary to, and in violation of law.

DISCOUNTING AUDITOR'S WARRANTS BY TREASURER, OR LOANING PUBLIC MONEY.

SECTION 911. If the State treasurer, or any county treasurer, discount auditor's warrants at less than the amount due thereon, either directly or indirectly, or through third persons, they shall be liable to a fine not exceeding one thousand dollars, to be prosecuted as other fines.

SEC. 812. County treasurers shall be liable to a like fine for loaning out, or in any manner using for private purposes, State or county funds in their hands, and the State treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor, to be prosecuted by the attorney-general in the name of the State. [Limitation, by section 4167, three years.]

DISINTERRING DEAD BODIES, ETC.

SECTION 4017. If any person without lawful authority willfully dig up, disinter, remove, or carry away, any human body or the remains thereof from its place of interment, or aid or assist in so doing; or willfully receive, conceal, or dispose of any such human body or remains thereof; or if any person willfully and unnecessarily, and in an improper manner indecently expose, throw away, or abandon any human body or the remains thereof in any public place, or in any river, stream, pond, or other place, every such offender shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both fine and imprisonment.

SEC. 4018. Any coroner or undertaker in any county or city in which the population exceeds one thousand inhabitants, may deliver to any medical college or school, or any physician in this State, for the purpose of medical and surgical study, the body or remains of any deceased person, except where such body has been interred or dressed for interment; but no such body shall be so delivered without the consent of the relatives or friends of such deceased person, if any such are known, nor where such deceased person expressed a desire during his last sickness that his body should be interred. If the body of any

person who has been a resident of the county when death took place for six months is so delivered, and the same shall be subsequently claimed by any relative or friend of such deceased person, such body shall be given up to such relative or friend. Any person who delivers or receives any body or remains, having knowledge that any of the foregoing provisions have been violated, shall, upon conviction thereof, be punished as provided in the preceding section.

SEC. 4019. The person receiving such body as contemplated in the preceding section, shall decently bury the remains thereof after such body shall have been used as aforesaid, and in case of a failure to so do such person shall be deemed guilty of a misdemeanor, and punished by fine not less than ten nor more than fifty dollars.

SEC. 4020. The remains of any person received as aforesaid, shall be used for the purpose of medical and surgical study alone, and in this State only, and whoever shall use such remains for any other purpose, or shall remove the same beyond the limits of this State, or in any manner traffic therein, shall be guilty of a misdemeanor, and shall, on conviction, be imprisoned for a term not exceeding one year in a county jail. [Limitation to sections 4017, 4018, 4020, is by section 4167, three years; section 4019, by section 4168, the limitation is one year.]

Under section 4017, the following form of indictment may be used:

Form of Indictment.

District Court of the County of.....

THE STATE OF IOWA	}	Disinterring Dead Bodies.
VS.		

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . , of the crime of disinterring a dead body, committed as follows: That said . . . did at and in the Marion Cemetery in the county and State aforesaid, unlawfully and willfully break and enter the grave in which one L. S., deceased, had lately then before been interred, and did then and there willfully and without lawful authority, dig up and remove the body of the said L. S., contrary to and in violation of law. *People v. Graves*, 5 Park. Cr. R., 134. See, also, "Malicious Mischief," "Injuries to Monuments," etc.

INDICTMENT—DESCRIPTION OF GRAVEYARD.

The sanctity of no particular place of burial is guarded by statute, but that of all places. The allegation of the burial grounds being in the town of . . . , is sufficient and need not state what particular yard. *People v. Graves*, 5 Park. Cr. R., 134.

NEGATIVE ALLEGATIONS—EXCEPTIONS.

It is not necessary to negative the possibility of leave granted

to take the body alleged to have been disinterred. *McNamie v. People*, 31 Michigan, 473.

UNLAWFUL—ALLEGATION.

The indictment need not set out that the disinterment was unlawful. *State v. McClure*, 4 Blackf., 6 Ib., 328; 6 Ib., 110.

NAME OF DECEASED.

An indictment charging the defendant with removing a deceased child, that had yet no name given to it, is sufficient. *Tate v. State*, 6 Blackf., 110.

ELEMENTS.

The disintering dead bodies, without leave or authority from those that have the right to give leave, constitutes an indictable offense. *Rex v. Gilles*, 1 Russ. by Grea., 464; Russ & Ry., 366; Roscoe's Cr. Ev., 7th ed., page 429; *State v. McClure*, 4 Blackf., 328.

ACCOMPLICE.

A person not actually present, may, by being near enough to give assistance, with the intention of doing so, be found guilty; and whether such facts exist or not is a question for the jury. *Tate v. State*, 6 Blackf., 110.

DISTURBING WORSHIPING CONGREGATIONS AND SELLING LIQUOR NEAR RELIGIOUS SOCIETIES.

SECTION 4023. If any person willfully disturb or disquiet any assembly of persons met for religious worship, by profane discourse or rude and indecent behavior, or by making a noise either within the place of worship or so near as to disturb the order and solemnity of the assembly, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. If any person or persons unlawfully or willfully disturb or interrupt any school, school meeting, teachers' institute, lyceum, literary society, or any other lawful assembly of persons being in the peace of the state, such person or persons shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

SEC. 4024. If any person within one mile from the place where any religious society is collected together for religious

worship in any field or woodland, expose to sale or gift any spirituous or other liquors, or any article of merchandise, or any provisions or other article of traffic, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.

SEC. 4025. The preceding section does not apply to tavern or grocery keepers exercising their calling or business in the places mentioned in their licenses, if they have such; nor to any distillers or manufacturers or others in the prosecution of their ordinary calling or business, so as to prevent them from vending or exposing to sale the articles above prohibited at their place of residence; nor to any person who has a written permit from the person having the charge of such religious society to sell any of such prohibited articles, on complying with the regulations of such religious assembly and with the laws of the state. [Limitation, by section 4168, one year.]

Form of Information.

THE STATE OF IOWA, }
vs. } Before . . . a justice of . . township, . . county, Iowa.
Information.

The defendant is accused of the crime of disturbing an assembly: For that said defendant . . . on the day of . . . 187 . in . . . township . . . county, did unlawfully and willfully disturb and disquiet a congregation of people then and there met for religious worship, at a place known as the "National Camp Ground," near the town of Springville, in the county and state aforesaid, then and there being occupied and used by the M. E. Church society, by then and there making a loud noise, and by rude and indecent behavior, so near to the said ground and society, by swearing, cursing, and singing indecent songs in a boisterous manner, contrary, etc.

Or, under section 4024, For Selling Liquor:

Did unlawfully erect and keep a certain tent for the purpose of selling and disposing of wine, whiskey, gin, rum and other intoxicating liquors, within one half mile of a certain collection or assembly of people then and there assembled for religious worship, at a place called the "National Camp Ground," situate near Springville, in said county and state, during the time of the holding of said meetings, contrary etc.

DRIVING STOCK FROM HOME OR PASTURE.

SECTION 3896. If any person knowingly or willfully drive off, or suffer or permit to be driven off, any horned or other stock of another, to a distance exceeding three miles from the residence of the owner, or of his agent having charge of such stock, or the range in which such stock is usually in the habit of running, without the consent of such owner or agent, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days; and any justice of the peace in any county through which the stock thus driven off should pass, or in which it may be found, shall have jurisdiction of the offense. [Limitation, by section 4168, one year.]

Form of Information.

THE STATE OF IOWA } Before . . . a justice of . . . county, Iowa.
vs. } Driving off Stock.
. } Information.

The defendant is accused of the crime of knowingly and willfully driving off stock: For that said defendant, on the . . . day of . . . , 1878, in the township of . . . , county of . . . and State of Iowa, three cows of the property of one C D, did knowingly and willfully drive off and away a great distance, to-wit: to a distance of five miles from the residence of him the said C D, in said township and county, unbeknown to and without the consent of him, the said C D, and contrary to and in violation of law.

DRUNKENNESS.

INTOXICATION.

For the punishment of intoxication, see "Prohibitory Liquor Law."

DRUNKENNESS—INTENT—BURGLARY.

While drunkenness is no excuse for a crime, yet, where a specific intent is necessary to constitute a crime, drunkenness may be proved for the purpose of showing that the intent could not have been formed. *State v. Maxwell*, 42 Iowa, 208; *State v. Bell*, 29 Ib., 316; *Swan v. State*, 4 Humph., 136; 1 Bishop's Cr. Law, section 490; *Pigman v. State*, 14 Ohio, 555; *Loza v. State*, 1 Texas Court of Appeals, 488.

GENERALLY, AS A DEFENSE.

Drunkenness cannot be considered unless it had the effect, in some degree, to deprive the accused of reason. The fact that he has been, on prior occasions, so drunk that he was deprived of his reason, or that, when drunk, his acts were like those of an insane man, could not establish the fact of his want of reason and responsibility when he committed the act for which he was indicted. *State v. Hart*, 29 Iowa, 272; *Calvin v. State*, 25 Texas, 795; *Ferrell v. State*, 43 Ib., 503; *Carter v. State*, 12 Ib., 500; *Wenz v. State*, 1 Texas Court of Appeals, R. 36.

VOLUNTARY DRUNKENNESS.

The voluntary drunkenness of a murderer neither excuses the crime nor mitigates the punishment. The rule is, that one in a state of voluntary intoxication is subject to the same rules of conduct, and to the same rules and principles of law, that a sober man is. *Shannahan v. Commonwealth*, 8 Bush., Ky., 463; 8 Am. R., 465. And, a person in that condition must

take the consequences of his own act. *People v. Rogers*, 18 N. Y., 9; *Lanergan v. People*, 6 Park. Cr. R., 209.

PREMEDITATION OF DEFENDANT.

In determining the question of premeditation, the defendant's mental status as to sobriety is proper for the consideration of the jury. *People v. Belencia*, 21 Cal., 544; *People v. King*, 27 Ib., 507; *People v. Williams*, 43 Ib., 344; 1 Green's Cr. R., 412.

MENTAL ALIENATION.

Mental alienation, produced by drinking intoxicating liquors, furnishes no immunity for crime. *Rex. v. Meaken*, 7 Carr & Payne, 297; *Rex. v. Thomas*, 7 Ib., 817; *U. S. v. McGlue*, 1 Curtis' C. C. R., 1; *People v. Rogers*, 18 N. Y., 9.

For drunkenness as a defense, see title, "Defense;" "Insanity."

DUELING.

SECTION 3852. Whoever fights a duel with deadly weapons, and inflicts a mortal wound on his antagonist, whereof death ensues, is guilty of murder of the first degree, and shall be punished accordingly.

SEC. 3853. Any person who fights a duel with deadly weapons, or is present at the fighting of such duel as aid, second, or surgeon, or advises, encourages, or promotes such duel, although no homicide ensue; and any person who challenges another to fight a duel, or sends or delivers any verbal or written message purporting or intended to be such challenge, although no duel ensue, shall be fined in a sum not exceeding one thousand dollars nor less than four hundred dollars, and imprisoned in the penitentiary not more than three years nor less than one year.

SEC. 3854. Any person who accepts such challenge, or who consents to act as a second, aid, or surgeon on such acceptance, or who advises, encourages, or promotes the same, although no duel ensue, shall be punished as prescribed in the preceding section. [Limitation, by section 4167, three years.]

SEC. 4158. When an inhabitant or resident of this state, by previous appointment or engagement, fights a duel, or is concerned as second therein without the jurisdiction of the state, and in such duel a wound is inflicted upon any person whereof he die within this state, the jurisdiction of the offense is in the county where the death may happen.

SEC. 5. Any citizen of this state who may hereafter be engaged, either directly or indirectly, in a duel, either as principal or accessory before the fact, shall forever be disqualified from holding any office under the constitution and laws of this state.

Form of Indictment.

District Court of the County of Linn.

THE STATE OF IOWA } District Court, of the county of Linn, . . term, 1878.
vs. } Dueling.

The grand jury of the county of Linn, in the name and by the authority of the State of Iowa, accuse . . of the crime of fighting a duel committed as follows: That the defendant the said . . . on the . . . day of . . . 1876, with force and arms at Marion, Linn county, Iowa, willfully and maliciously did write, send, and deliver a certain message to one C D, purporting and intending to be a challenge to the said C D, to fight a duel with the said . . . with a deadly weapon, to-wit: a pistol, the said pistol to be loaded with powder and a leaden bullet. A copy of said written message is here set out. (Here insert message.) Or, accepting a challenge to fight a duel on the . . . day of . . . 1876, in the county and State aforesaid, did unlawfully and maliciously accept a written message from one . . . of said county and State aforesaid, purporting and intending to be a challenge to the said . . . to fight a duel with the said . . . with a deadly weapon, to-wit: a pistol, and the said . . . did then and there willfully and maliciously agree to and with said . . . to fight a duel with him, the said . . . with a deadly weapon, to-wit: a pistol, pursuant to the challenge aforesaid. Or, for carrying a challenge to fight a duel, did willfully and knowingly carry a written challenge from one . . . of said county and State to one . . . of said county and State, purporting and intending to be a challenge to the said . . . to fight a duel with the said . . . with a deadly weapon, to-wit: a pistol, then and there to be loaded with powder and leaden bullets, pursuant to said challenge, contrary to and in violation of law.

For murder, under section 3852 above, see title, "Murder."

To write and deliver, or cause to be delivered to another, a challenge to fight a duel, is a misdemeanor at common law. 3 City Hall Recorder, N. Y., 90.

It is the province of the jury to determine whether the writing was intended as a challenge or not. 3 City Hall Recorder, N. Y., 139.

JURISDICTION—STATES.

Where a challenge is delivered in one State to fight a duel in another, *held*, the violation to be in the former State. *State v. Taylor*, 3 Brev., 243.

FORM OF CHALLENGE.

No particular form of words is necessary to constitute a challenge to fight a duel. *Ives v. State*, 12 Ala., 276.

INDICTMENT,

An indictment for sending a challenge need not set out a copy of the challenge. *State v. Farrier*, 1 Hawks, 487; *Brown v. Com.*, 2 Va. Cas., 516.

EVIDENCE—INTENT.

The intent and meaning of the supposed challenge may be shown upon the the trial by proof written or oral. *Com. v. Pope*, 3 Dana, 418; *Com. v. Hart*, 6 J. J. Marsh, 719; *Herriott v. State*, 1 McMullan, 126.

EMBEZZLEMENT.

SECTION 3908. If any state, county, township, school, or municipal officer, or officer of any state institution, or other public officer within the state charged with the collection, safe keeping, transfer or disbursement of public money, fails or refuses to keep in any place of deposit that may be provided by law for keeping such money, until the same is withdrawn therefrom upon warrants issued by the proper officer, or deposits such money in any other place than in such safe, or unlawfully converts to his own use in any way whatever, or use by way of investment in any kind of property, or loan without the authority of law any portion of the public money entrusted to him for collection, safe keeping, transfer or disbursement, or converts to his own use any money that may come into his hands by virtue of his office, shall be guilty of embezzlement to the amount of so much of said money as is thus taken, converted, invested, used, loaned, or unaccounted for, and, upon conviction thereof, he shall be imprisoned in the penitentiary not exceeding five years and fined in a sum equal to the amount of money embezzled; and, moreover, is forever after disqualified from holding any office under the laws or constitution of this state.

SECTION 4317. In an indictment for the embezzlement or fraudulent conversion of money, it shall be sufficient to allege the embezzlement or fraudulent conversion to have been of money generally, without designating its particular species; and proof that the defendant embezzled, or fraudulently converted any money or bank note, will be sufficient to support the averment, although the particular species be not proved. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA,	}	District Court of the County of term, 1878.
vs.		Embezzlement.
.		Indictment.

The grand jury of the county of . . . In the name and by the authority of the State of Iowa, accuse . . . of the crime of embezzlement, committed as follows: That said defendant, on the . . . day of . . . , 1878, at Marion, . . . county, Iowa, was in the employment of one A B, treasurer of . . . county, Iowa, and a public officer, as his deputy treasurer, and as such, being his clerk and servant, and agent, by virtue of his said employment, was intrusted with, and received into his possession, and under his care, a certain county order, dated at Marion, Iowa, Sept. 7, 1878, and drawn by one D C, county auditor of said . . . county, Iowa, for the

sum of six hundred dollars, payable on demand to said A B, as treasurer of said . . . county, Iowa, and the property of said . . . county, and of the value of six hundred dollars; a copy of said order is in words and figures following, to-wit. (here copy order): That it was the duty of said defendant, as such deputy treasurer, upon receipt of said order, to forthwith pass over and deliver the same to the treasurer of said . . . county, Iowa, but that he did then and there, in violation of his duty, without the consent of the said A B, his employer, unlawfully, feloniously and fraudulently convert to his own use, and did then and there unlawfully, feloniously and fraudulently embezzle the said county order, contrary to and in violation of law.

This form is substantially sustained in *State v. Orwig*, 24 Iowa, 102.

Or, under section 3909, chapter "Larceny," may be in the following form:

. . . . on the . . . day of . . . 1876, at the county aforesaid, being then and there clerk of A B, and over the age of sixteen years, did then and there by virtue of his said employment, have, receive and take into his possession certain money, to-wit: the sum of two hundred dollars, and of the value of two hundred dollars; the particular description of said money is to this grand jury unknown, and being of the property and moneys of said A B, the said defendant's employer; and that he did then and there, unlawfully, feloniously and fraudulently embezzle and convert to his own use without the consent of the said A B, his employer, the said sum of two hundred dollars, by means of which the said D C is deemed to have committed the crime of larceny. And the jurors aforesaid do aver, find and present that the said D C, then and there, in manner and form aforesaid, money and property of the said A B; employer of defendant, did feloniously steal, take and carry away, contrary to and in violation of law.

State v. Foster, 37 Iowa, 405.

Or, under section 3910, chapter "Larceny":

That on the . . . day of 1876, A B, at Marion, Linn county, Iowa, did deliver to one C D, being then and there a common carrier, a certain sum of money, to-wit: one hundred dollars, and of the value of one hundred dollars, of the property of said A B, to be carried by the said C D, for hire, to-wit, for the sum of two dollars, and to be delivered by the said C D for the said A B, and by him the said A B sent and directed to one E F, at Cedar Rapids, Iowa. And that the said C D did, by virtue of his said employment as a common carrier, at Marion aforesaid, county and State aforesaid, and while he was so employed, as aforesaid, take into his possession said money to be carried and delivered as aforesaid; and that on the . . . day of . . . 1876, at Cedar Rapids, Linn county, Iowa, he, the said C D, feloniously did embezzle and fraudulently convert to his own use the said one hundred dollars, whereby he, the said C D, is deemed to have committed the crime of larceny. And the jurors aforesaid do find, aver and present that the said C D, on the . . . day of . . . 1876, in Linn county, Iowa, in manner and form aforesaid, the property of A B, feloniously did take, steal and carry away, contrary, etc.

EMBEZZLEMENT—LARCENY.

Where property is entrusted to a clerk, agent or servant by his employer, and while entrusted to him he converts it to his own use, it is embezzlement, and not larceny. *Ennis v. The State*, 3 Greene, Iowa, 67; *Com. v. Butterick*, 100 Mass., 1; *State v. Heally*, 48 Mo., 531.

ELEMENTS.

Where grain was left in a party's warehouse without hire it is not embezzlement. *State v. Stoller*, 38 Iowa, 321.

If articles left in defendant's care for exchange and are stolen,

the crime is embezzlement. *State v. Foster*, 37 Ib., 405; 1 Am. Cr. R., 146.

Drafts, notes and bills are the subject of embezzlement. *State v. Orwig*, 24 Ib., 103; *Lowhenthal v. State*, 32 Ala., 589.

PRIVATE CARRIER.

Under section 28, chapter 165, Wisconsin statute, 1858, which is the same as section 3910, Code of Iowa, money intrusted to a person in a private capacity, which he converts to his use, is not embezzlement. *Whit v. State*, 20 Wis., 233; *Lewis v. Kendell*, 6 Howard Prac. (N. Y.), 59.

CONVERSION.

Taking and converting articles at different times constitutes but one transaction, so far as a servant is concerned. *Gravatt v. The State*, 25 Ohio St., 167.

Under section 3908, conversion may be shown by direct proof, or by demand and refusal. *State v. Bryan*, 40 Iowa, 381.

EXCUSE FOR REFUSAL.

The prisoner may give an excuse for failing to comply with the demand, if he have any. *State v. Bryan*, 40 Iowa, 381; *State v. Leonard*, 6 Cald. (Tenn.), 307; *State v. Cameron*, 3 Heiskel (Tenn.), 78. But this doctrine of excuses does not apply under section 3909, Iowa Code. *State v. Bryan*, 40 Iowa, 382; 2 Bish. Cr. Law, Sec. 360.

OFFICERS ESTOPPED FROM DENYING OFFICIAL CHARACTER.

An officer who holds himself out as such, cannot deny his official capacity. 1 Bish. Cr. Law, Sec. 917; 2 Wharton Cr. Law, Sec. 2533; *State v. Stone*, 40 Iowa, 547.

DISTINCTION—EMBEZZLEMENT—LARCENY.

Where any part is separated from the bulk as delivered to a carrier, with intent to convert it to his own use, it is larceny; but where the whole delivered is converted, it is embezzlement. 2 East. Cr. Law, 698; *Com. v. Brown*, 4 Mass., 580; 1 Pick. (Mass.), 375; *Nichols v. The People*, 17 N. Y., 115.

DEPUTY STATE OFFICERS.

Deputy State officers are within the meaning of section

3908, which is the same as section 4243, Rev. 1860. *U. S. v. Hartwell*, 6 Wall., 385; *Bamford v. Melvin*, 7 Maine, 5; *Vaughan v. English*, 8 Cal., 39; *U. S. v. Ticklepaugh*, 3 Blatchf., 425; *Bradford v. Justices*, 33 Geo., 336; *State v. Brandt*, 41 Iowa, 606.

SERVANT.

One employed at a monthly salary, and subject to the direction and control of his employer, is properly described as a servant. *Gravatt v. The State*, 25 Ohio St., 162.

INDICTMENT.

The indictment must allege that the property was converted without the consent of the owners. *State v. Foster*, 11 Iowa, 291.

It must also state the facts constituting the embezzlement. *Com. v. Simpson*, 9 Metcalf, 138; *Com. v. King*, 9 Cush., 287; *State v. Brandt*, 41 Iowa, 609.

Also the name of the person to whom the money was loaned, should be set out, and that the amount taken or converted from the county or State was not accounted for. *State v. Brandt*, 41 Iowa, 607.

NEW TRIAL—VALUE.

Where the State, on trial, proved the value of the property embezzled to be ninety dollars, and the prisoner was able, by newly discovered evidence, to show the value to be only ten dollars, the order granting a new trial was affirmed. *State v. Foster*, 37 Iowa, 405; 1 Am. Cr. R., 146.

The money embezzled need not be described or identified. *People v. McKinney*, 10 Mich., 91.

It is not necessary to allege that the money was in any particular place. It is within the custody of the officer, wherever and whenever found under the control of the officer. *People v. McKinney*, 10 Mich., 88.

ENTICING FEMALE CHILD FOR THE PURPOSE OF PROSTITUTION.

SECTION 3865. If any person take or entice away any unmarried female under the age of fifteen years from her father, mother, guardian, or other person having the legal charge of

her person without their consent, for the purpose of prostitution, he shall, upon conviction, be punished by imprisonment in the penitentiary for not more than three years, or by fine of not more than one thousand dollars and imprisonment in the county jail not more than one year. [Limitation, by section 4166, eighteen months.]

Form of Indictment.

THE STATE OF IOWA, } District Court of the County of term, 1878.
vs. } Enticing child for the purpose of prostitution.
. } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of enticing away a female child under the age of fifteen years for the purpose of prostitution, committed as follows: That the said . . . , on the . . . day of . . . , 1878, in the county and State aforesaid, one S T, a female child under the age of fifteen years, to-wit: of the age of nine years, did take and entice away from her father, H T, he, the said H T, then and there having the legal charge of the said S T, unlawfully, feloniously, and without the consent and against the will of the said H F, for the purpose of prostitution, contrary to and in violation of law.

EVIDENCE—AGE OF FEMALE—REPRESENTATION AS TO AGE.

Under a charge of enticing a female under fifteen years for the purpose of prostitution, evidence as to what the female said to the defendant, as to her being over that age, is inadmissible. This would be no defense, whether she was or was not of that age, there existed a criminal intent. If this evidence was introduced, it would only show that he intended one wrong and, by mistake, committed another. The wrongful intent to do the one act is only transposed to the other. And though the wrong intended is not indictable the defendant would still be liable if the wrong done is so. *State v. Ruhl*, 8 Iowa, 449.

WHAT PROSECUTING WITNESS SAID.

Statements made by the prosecuting witness as to her intentions of leaving home, and of treatment received by her from her parents or guardian is inadmissible, and can only be introduced for the purpose of impeachment. *State v. Ruhl*, 8 Iowa, 449.

LEGAL CHARGE OF FEMALE.

By the words of the statute, having the "legal charge," is not meant that the person other than the father or mother must necessarily be appointed as guardian. If the female is left in the charge of a person by the parent or other parties, and such person had such custody and control by consent, this

is sufficient. If the parents be dead and no guardian has been appointed, those with whom she resided as a member of the family and who had her wholly under their care and protection would have the "legal charge of her person." *Stale v. Ruhl*, 8 Iowa, 449; 3 Mod., 84; 1 East., P. C., 457; 2 Blackst., 209.

PROSTITUTION, CONSTRUCTION OF.

An instruction "if the defendant only intended to obtain the body of the said A. for his own personal carnal enjoyment, and no more, then the act did not amount to her prostitution in the sense of the law," the court *held* to be proper, as the charge includes and has reference to indiscriminate lewdness; and the mere enticing away of a female for a personal sexual intercourse, will not subject the offender to the penalties of the statute. *Commonwealth v. Cook*, 12 Met., 93; *Carpenter v. People*, 8 Barb., 603; *State v. Ruhl*, 8 Iowa, 453.

ENTICING VIRTUOUS FEMALES TO HOUSE OF ILL-FAME.

SECTION 4016. If any person inveigle or entice any female, before reputed virtuous, to a house of ill-fame, or knowingly conceal or aid or abet in concealing such female so deluded or enticed for the purpose of prostitution or lewdness, he shall be punished by imprisonment in the penitentiary not more than ten years nor less than three years. [Limitation, by section 4167, three years.]

Form of Indictment.

District Court of the County of

THE STATE OF IOWA, }
vs. } Enticing virtuous females to house of ill-fame.
..... } *Indictment.*

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of enticing a virtuous female to a house of ill-fame committed as follows: That said A B on the . . . day of . . . at Marion, in the county and State aforesaid, one S T, a virtuous female then and there being, did inveigle and entice away to a house of ill-fame situate in said county, for the purpose of prostitution, against the will of her the said S T, and contrary to and in violation of law.

ESCAPE OF PRISONER.

SECTION 4659. If any person confined in a county jail upon any conviction for a criminal offense, break such jail and

escape therefrom, he shall be imprisoned in such prison not exceeding one year, to commence from and after the expiration of the former sentence, and fined not exceeding three hundred dollars. [Limitation, by section 4167, three years.]

Form of Indictment.

. *District Court of the County of*

THE STATE OF IOWA, }
vs. } Escape of Prisoner.
..... } *Indictment.*

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of breaking and escaping from a jail, committed as follows: That, heretofore, to-wit, at the October Term of the District Court holden for the county of Linn, and State aforesaid, A. D. 1876 (here continue the record of conviction in the past tense), as by the record thereof more fully appear; which said judgment still remains in full force and effect, and not in the least manner reversed or made void; and the jurors first aforesaid, upon their oaths aforesaid do further present, that afterward, to-wit, at the said October term of the court above mentioned, he, the said A B was then and there committed to the care and custody of the keeper of the county jail of said county, situate in the town of Marion, there to be kept in safe custody, for the full term of his confinement under the sentence and judgment of the court aforesaid; and the jurors aforesaid, upon their oaths aforesaid, do further find and present that he, the said A B, before the termination of said term (here set out the term of imprisonment), unlawfully and feloniously, and by force and violence, did break the said county jail and prison by *sawing and fling off the hinges of the door thereof, and bursting the same open* (or any other means of escape), and by means thereof did escape from the said jail and prison, and go whithersoever he would, contrary to and in violation of law.

INDICTMENT—FELONIOUSLY, AT LARGE.

In an indictment, under 5 Georgia, it is necessary to aver that the prisoner was feloniously at large before the expiration of his sentence, and an indictment omitting the word "feloniously" is bad. *Reg. v. Horne*, 4 Cox's C. C., 263.

ELEMENTS.

The escape from prison by a prisoner, confined on a charge of felony, is itself above the degree of petit larceny, and punishable by imprisonment. *People v. Duell*, 3 Johnson, 449. A person as a prisoner in jail, who attempts to escape, by breaking, and in consequence thereof a felon prisoner escapes, he is also guilty in aiding a prisoner to escape. *People v. Rose*, 12 Johnson, 338. And, the fact that a defendant was confined on a criminal charge, without any evidence being heard before the magistrate, is no defense for breaking jail, and he was legally in custody, though no evidence was introduced. *Reg. v. Waters*, 12 Cox's Criminal Cases, 390; 1 Green's Crim. R., 94.

An escape by a person in custody, on a criminal charge,

may be either with or without force, or with or without the consent of the officer or other person who has him in custody. All persons are bound to submit themselves to the judgment of law; and, therefore if any one, being in custody, frees himself by any artifice, he is guilty of a high contempt, punishable by fine and imprisonment. 2 Hawk. P. C., chapter 17. And if, by the consent or negligence of the jailor, the prison doors are opened, and the prisoner escapes, without making use of any force or violence, he is guilty of a misdemeanor. 1 Hale's P. C., 611. It must be proved that the party was in custody upon a criminal charge, otherwise the escape is not a criminal offense. 1 Russ., by GREAR, 416; Roscoe's Crim. Evidence, 7th edition, marginal page 460.

EXPIRATION OF SENTENCE—NEW SENTENCE.

In cases where, before the expiration of a term of imprisonment, the prisoner escapes, no new award of execution is necessary or proper. The prisoner can be retaken at any time, and confined under the authority of the original judgment until his term of imprisonment has been finished. If the wrong person should be taken, or if the prisoner's term has in fact expired, he can obtain relief by *habeas corpus*. *Haggerty v. People*, 53 N. Y., 476.

EXERCISING OFFICIAL FUNCTIONS AFTER SUSPENSION.

SECTION 760. Whenever any commission appointed as aforesaid, or under the provisions of section one hundred and thirty-two, of chapter nine, of title two of this Code, shall report that any officer has been guilty of any defalcation or misappropriation of the public money, or that his accounts, papers, and books are improperly or unsafely kept, and that the State is liable to suffer loss thereby, the governor shall forthwith suspend such officer from the exercise of his office, and require him to deliver all the money, books, papers, and other property of the State to the governor to be disposed of as hereinafter provided.

SEC. 761. After such suspension, it shall be unlawful for such officer to exercise or attempt to exercise any of the functions of his office, until such suspension shall be revoked, and any attempt to exercise said office after such suspension, shall be deemed a misdemeanor, and shall subject the offender for

each offense to the penalty of not more than one year's imprisonment in the county jail, and not more than one thousand dollars fine, to be recovered and enforced as provided by law. [Limitation, by section 4167, three years.]

EXPOSING CHILD.

SECTION 3870. If the father and mother of any child under the age of six years, or any person to whom such child has been entrusted or confided, expose such child in any highway, street, field, house, or outhouse, or in any other place with intent wholly to abandon it, he or she, upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding five years. [Limitation, under section 4167, three years.]

Form of Indictment.

District Court of the County of

THE STATE OF IOWA	}	District Court of the county of term, 18 .
vs.		Exposing a Child.
.		<i>Indictment.</i>

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of exposing a child under six years old, committed as follows: That the said A B then and there being, a person to whom a certain male child under six years of age, to-wit: named and called F M, was by one H F, its mother confided for care, nurture and maintenance, did then and there knowingly, willfully and feloniously, expose the said child F M, in a public street, in the city of Marion, county and State aforesaid, known and designated as Maine street, with intent then and there wholly to abandon the said child, contrary to and in violation of law.

The Michigan law in relation to this crime, is in substance, like that of Iowa, above cited, and reads as follows: "If the father or mother of any child, or any other person to whom any such child shall have been confided, shall expose such child in any field, street, house, or other place, with intent wholly to abandon it, he or she shall be punished," etc." Michigan Laws, 1857, section 5741.

So under the Iowa Code, section 3870. "If the father *"and"* mother of any child under, etc." It was claimed that this crime could not be committed unless, the father and mother, *"jointly"* participate therein, or both know of the intention to abandon the child, by reason of the word *"and"* instead of the word *"or"* being inserted in the section. The court held that the word *"and"* may be construed to mean *"or,"* and the offense charged may be committed by either parent. *State v. Smith*, 46 Iowa, 670.

INDICTMENT.

Under this law the indictment must allege that the defendant was the father or mother of the child, or that it has been confided to him; and this allegation must be sustained by proof. *Shannon v. People*, 5 Mich., 71; 2 Hawk. Chap. 25, Sec. 112.

NAME OF CHILD.

The fact that the indictment did not give any name to the child, but described it as "then lately born" is sufficient, and need not contain the words "unknown to the jury." And in this case the child was a bastard only eight months old and could only have a name by reputation or baptism, and does not take the name of the mother, unless gained by reputation. *Rey v. Clark*, Russ. & Ry., 358; *Rex v. Waters*, 1 Moody C. C., 457; *Reg. v. Stroud*, 1 C. & K., 187; *Shannon v. People*, 5 Mich., p. 80.

EXPOSING, INTENT, CONSTRUCTION OF.

The term "abandon" is here used in its ordinary sense, to forsake; to leave without the intention to return to; to renounce all care or protection of. It refers only to the intentions of the party as connected with his own act, not the acts of others. The intent to abandon, therefore on the part of the person exposing the child, has no reference to the probability or improbability of relief to the child from other hands; this intent is wholly independent of, and does not necessarily imply, an intent to injure. But to "expose" the child is the substantive act. At common law, the exposure of a child, with intent to abandon, was no offense, unless injury to the child actually ensued. 5 Eng. L. & Eq. R., 553; *Shannon v. People*, 5 Mich., 71.

EXTORTION BY OFFICER.

SECTION 3950. If any person corruptly and willfully demand and receive of another, for performing any service or official duty for which the fee or compensation is established by law, any greater fee or compensation than is allowed or provided for the same; or if any witness falsely and corruptly certify that as such he has traveled more miles, or attended more days, than he has actually traveled or attended, he shall be punished by fine not exceeding one hundred dollars for each

there must be an averment of that fact, and if the charge be for taking more than was due, the indictment must show how much was due. *State v. Coggsell*, 3 Blackf., 54.

FAILURE TO DEPOSIT NOTARY'S OFFICIAL PAPERS.

SECTION 264. On the death, resignation, or removal from office, of any notary, his records, with all his official papers, shall, within three months therefrom, be deposited in the office of the clerk of the district court in the county for which such notary shall have been appointed; and if any notary, on his resignation or removal, neglects for three months so to deposit them, he shall be held guilty of a misdemeanor, and be punished accordingly, and be liable in an action to any person injured by such neglect; and if an executor or administrator of a deceased notary willfully neglects for three months after his acceptance of that appointment, to deposit the records and papers of a deceased notary which came into his hands in said clerk's office, he shall be held guilty of a misdemeanor, and punished accordingly. [Limitation, by section 4167, three years, as provided by section 3967; being an indictable misdemeanor where the punishment is not prescribed.]

FALSE BILLS OF LADING AND FALSE AFFIDAVITS AND PROTESTS.

SECTION 4084. If any owner of any boat or vessel, or of any property laden or pretended to be laden on board the same; or if any other person concerned in the lading or fitting out such boat or vessel, make out and exhibit, or cause to be made out and exhibited, any false estimate of any goods or property laden, or pretended to be laden, on board such boat or vessel with intent to injure or defraud any insurer of such boat or vessel or property, or of any part thereof, he shall be fined not exceeding one thousand dollars, or imprisoned in the penitentiary not more than three years.

SEC. 4085. If any master or other officer of any boat or vessel, make, or cause to be made, any false affidavit or protest; or if any owner or other person concerned in such boat or vessel, or in the goods or property laden on board the same, procure any such false affidavit or protest to be made, or exhibit the same with intent to injure, deceive, or defraud any insurer of such boat or vessel, or of the goods or property laden on board of the same, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not ex-

ceeding three thousand dollars and imprisonment in the county jail not exceeding one year. [Limitation, by section 4167, three years.]

FALSELY ASSUMING TO BE AN OFFICER.

SECTION 3962. If any person falsely assume to be a judge, justice of the peace, magistrate, sheriff, deputy sheriff, coroner, or constable, and take upon himself to act as such or require any one to aid or assist him in any matter pertaining to the duty of any such officer, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding three hundred dollars.

SEC. 3963. If any person take upon himself to exercise or officiate in any office or place of authority in this state, without being legally authorized; or if any person by color of his office, willfully and corruptly oppress any person under pretense of acting in his official capacity, he shall be punished by fine not exceeding one thousand dollars, or imprisonment in the county jail not more than one year; or by both fine and imprisonment. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA } District Court of the county of term, 1878.
VS. }
. } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of falsely assuming to be an officer, to-wit: a notary public, committed as follows: Said defendant, on the . . . day of . . . , 1878, in said county and State, did feloniously and falsely represent and personate one A S, then of Marion, aforesaid county, and State aforesaid, to be a notary public, and did then and there, in the assumed name of A S, aforesaid, as such notary, without authority so to do, unlawfully, fraudulently and feloniously acknowledged for one C D a certain warranty deed and conveyance of a certain tract of land, situate in said county, purporting to be from the said C D to one E F; the said A S then and there having no legal authority to take such an acknowledgement of said deed as aforesaid, with intent thereby to defraud, against the peace and dignity of the State, and contrary to and in violation of law.

FALSE VOUCHERS BY WAREHOUSEMEN.

SECTION 4088. If any person issue any receipt or voucher, stating or purporting to state the receipt by him from another, of any property for storage or safe keeping without having in good faith received, and at the time having in his possession or under his control, such property; or issue any second receipt or voucher for any property while his former receipt or voucher for the same, or any part thereof, shall be outstanding and uncanceled; or sell, encumber, transfer, ship, or in any manner remove beyond his immediate control, any property for which a receipt or voucher has been given by him as aforesaid, in violation of the terms of such receipt or voucher, without the

written consent of the person holding such receipt or voucher, except to enforce his lien for storage and warehouse charges as provided by law; or sell, transfer, or dispose of any receipt or voucher, given or purporting to have been given by any person for property in store, knowing that such person has not in his possession such property or any part thereof, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the penitentiary of this state not exceeding five years. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA, } District Court of the county of term, 1878.
vs. }

Indictment.

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of issuing a false voucher, committed as follows: That A B on the . . day of . . 187 . in the county of . . and State of Iowa, then and there being a warehouseman, did in said business as a warehouseman, receive from C D for storage and safe keeping, a certain quantity of grain, to wit, one hundred bushels of wheat, and did on the said . . day of . . issue and give to the said C D a receipt or voucher therefor, by the terms of which receipt or voucher the said wheat was to remain in the warehouse of the said A B for the space of six months, but that the property therein should in no manner be transferred from the said C D. And the grand jurors aforesaid, legally convoked and empanelled as aforesaid, do hereby further find and present, that afterwards, to wit, on the . . day of . . , the said A B, unbeknown to, and without the consent of the said C D, and in gross violation of the terms of said receipt or voucher aforesaid, willfully, unlawfully and feloniously, did sell and dispose of said grain to-wit: the said one hundred bushels of wheat, to one E F for the sum of . . dollars. That at the time of said sale, by the said A B to the said E F, there was existing no debt from the said C D to the said A B, and that said sale was not made to enforce any storage lien which the said A B might have against said C D, but was made with the intent feloniously to convert said property or the proceeds thereof to the use of him, the said A B, contrary to, and in violation of law.

FIRE COMPANIES.

SECTION 1563. Any person who shall, either by misrepresentation or by the use of a false certificate, or the certificate of any other person, endeavor to avail himself of the benefits of this chapter, upon conviction thereof before any mayor, recorder, or magistrate of any incorporated city or town, or before any district court, shall be sentenced to imprisonment in the county jail for a period of not more than six months, or less than one month, and to pay a fine of not less than ten dollars, or more than one hundred dollars.

SEC. 1564. Any person or persons who shall willfully destroy or injure any engines, hose carriage, hose, hook and ladder carriage, or anything whatever, used for the extinguishment of fires, belonging to any fire company, on conviction thereof shall be sentenced to imprisonment in the penitentiary for a period of not less than one year, nor more than three years.

SEC. 1565. It shall not be lawful for any person to remove

any engine or other apparatus for the extinguishment of fire, from the house or other place where the same shall be kept or deposited, except in time of fire or alarm of fire, unless properly authorized so to do by the president and director, or foreman, of the company to whom the same shall belong, or their duly authorized agent; and any person offending against the provisions of this section shall forfeit and pay a sum not less than five dollars, nor more than twenty dollars, to be sued for and recovered in the name of the state, for the use of the school fund, before any mayor, recorder, or magistrate of the city or town wherein the offense has been committed.

SEC. 1566. It shall not be lawful for any person or persons to cause a false alarm of fire, either by setting fire to any combustible material, or by giving an alarm of fire without cause, and any person offending against the provisions of this section shall be fined a sum of not less than five dollars or more than twenty dollars, to be sued for and recovered as specified in the foregoing sections.

FORGERY AND COUNTERFEITING.

SECTION 3917. If any person with intent to defraud, falsely make, alter, forge, or counterfeit any public record, or any process issued or purporting to be issued by any competent court, magistrate or officer, or any pleading or proceeding filed or entered in any court of law or equity; or any attestation or certificate of any public officer, or other person, in relation to any matter wherein such attestation or certificate is required by law, or may be received or be taken as legal proof; or any charter, deed, will, testament, bond, writing obligatory, power of attorney, letter of credit, policy of insurance, bill of lading, bill of exchange, promissory note; or any order, acquittance, discharge, or accountable receipt for money, or other valuable thing; or any acceptance of any bill of exchange, or order; or any indorsement, or assignment of any bill of exchange, promissory note, or order, or of any debt or contract; or any instrument in writing, being or purporting to be, the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is, or purports to be created, increased, transferred, conveyed, discharged, or diminished, he shall be punished by imprisonment in the penitentiary not more than ten years.

SEC. 3918. If any person utter and publish as true any record, process, certificate, deed, will, or any other instrument of writing mentioned in the preceding section, knowing the same to be false, altered, forged, or counterfeited, with intent to defraud, he shall be punished by imprisonment in the peniten-

tiary not more than fifteen years and fined not exceeding one thousand dollars.

SEC. 3919. If any person with intent to defraud, falsely make, utter, forge, or counterfeit any note, certificate, state bond, warrant, or other instrument, being public security for money, or other property issued or purporting to be issued by authority of this state, or any other of the United States; or any endorsement or other writing purporting to transfer the right or interest of any holder of such public security, he shall be punished by imprisonment in the penitentiary not more than twenty years, nor less than five years.

SEC. 3920. If any person make, alter, forge, or counterfeit, any bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company duly authorized for that purpose by any state of the United States, or any other government or country, with intent to injure or defraud, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 3921. If any person has in his possession any forged, counterfeited, or altered bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued as is mentioned in the preceding section, with intent to defraud, knowing them to be so forged, counterfeited, or altered, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding two hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 3922. If any person utter or pass, or tender in payment as true, any false, altered, forged, or counterfeited note, certificate, state bond, warrant, or other instrument of public security, or any bank bill, promissory note, draft or other evidence of debt issued or purporting to be issued by any corporation or company duly authorized as heretofore mentioned, knowing the same to be false, altered, forged, or counterfeited, with the intent to injure or defraud, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 3923. If any person having been convicted of the offenses described in the preceding section, afterward be convicted of a like offense; or if any person at the same term of the court is convicted of three such distinct offenses, he shall be punished by imprisonment in the penitentiary not less than two years, nor more than ten years.

SEC. 3924. If any person engrave, make, or mend, or begin

to engrave, make, or mend any plate, block, press, or other tool, instrument, or implement; or make or provide any paper or other materials adapted and designed for the forging or making any false and counterfeit note, certificate, state bond, warrant, or other instrument of public security for money or other property of this state, or any other of the United States; or any bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company; and every person who has in his possession any such plate or block engraved in any part, or any press or other tool, instrument, or implement, paper or other material adapted and designed as aforesaid, with intent to use the same, or to cause or permit the same to be used in forging or making any such false and forged certificates, notes, bonds, warrants, public securities, or evidences of debt, shall be punished by imprisonment in the penitentiary for not more than five years nor less than two years.

SEC. 3925. If any person forge or counterfeit any gold or silver coin current by law or usage within this state, and if any person have in his possession at the same time five or more pieces of false money or coin counterfeited in the similitude of any gold or silver coin current as aforesaid, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, he shall be punished by imprisonment in the penitentiary not more than ten years nor less than one year.

SEC. 3926. Any person who has in his possession any number of pieces less than five of the counterfeit coin mentioned in the preceding section, knowing the same to be false or counterfeit, with intent to utter or pass the same as true; and any person who utters, passes, or tenders in payment any false and counterfeit coin, knowing the same to be false and counterfeit, shall be punished by imprisonment in the penitentiary not exceeding eight years, or fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year.

SEC. 3927. If any person fraudulently connect together different parts of several genuine bank bills, notes, or other instruments in writing, so as to produce one instrument; or alter any note or instrument in writing in a matter that is material with intent to defraud, the same shall be deemed forgery in like manner as if such bill or note or other instrument had been forged and counterfeited, and the offender shall be punished accordingly.

SEC. 3928. If any fictitious or pretended signature of an officer or agent of any corporation be fraudulently affixed to any instrument of writing, purporting to be a note, draft, or other evidence of debt issued by such corporation, with intent

to utter or pass the same as true, it is a forgery, though no such person may ever have been an officer or agent of such corporation, nor such corporation have ever existed. Every person guilty of this offense shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding three hundred dollars, and imprisonment in the county jail not more than one year.

SEC. 3929. The total or partial erasure or obliteration of any record, process, certificate, deed, will, or any other instrument in writing mentioned in this chapter with the intent to defraud, shall be deemed forgery, and the offender shall be punished by imprisonment in the penitentiary not exceeding five years, or fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year.

SEC. 3930. If any person having been convicted of either of the offenses mentioned in the preceding section be afterwards convicted of a like offense; or if any person at the same term of court, be convicted of three such distinct offenses, he shall be punished by imprisonment in the penitentiary not more than ten years, nor less than three years.

SEC. 3931. If any person cast, stamp, engrave, make, or mend, or have in his possession, any mould, die, press, or other instrument or tool adapted and designed for the forging and counterfeiting of any coin before mentioned with intent to use the same, or permit the same to be used for that purpose, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.

SEC. 3932. If any person forge or counterfeit any gold or silver coin of any foreign government or country, with intent to export the same to injure or defraud any such government or the citizens thereof, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

SEC. 3933. Every person who is convicted of having forged, counterfeited, or falsely altered the great seal of this State; or the seal of any public office authorized by law; or the seal of any court, corporation, city, or county; or who falsely makes, forges, or counterfeits any impression purporting to be the impression of any such seal with intent to defraud, shall be punished by imprisonment in the penitentiary not exceeding ten years.

SEC. 3934. On the trial of any person for forging or counterfeiting any bill, note, or any other evidence of debt purporting to be issued by any incorporated company; or for uttering, passing, or attempting to pass; or having in possession the same with intent to utter or pass such bill, note, or evidence

of debt, it is not necessary to prove the incorporation by the charter or act thereof; but the same may be proved by general reputation, and persons of skill are competent witnesses to prove that such bill, note, or evidence of debt is forged or counterfeit.

SEC. 3935. If any person with intent to defraud, falsely make, forge, or counterfeit any stamp or brand authorized by law to be affixed to any substance or thing whatever; or, knowing such stamp or brand to be counterfeit, use the same as genuine with intent to defraud, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

SEC. 4313. In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense that may be prosecuted, it shall be sufficient to allege in the indictment an intent to defraud without naming the particular person or body corporate intended to be defrauded; and on the trial of such indictment it is sufficient if there appear to be an intent to defraud the United States, or any state, county, city, or township, or any body corporate, or any officer in his official capacity, or any co-partnership, or member thereof, or any particular person. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA } District Court of the County of term, 1878.
vs. }

Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of having in his possession counterfeit money with intent to pass the same, committed as follows: That the said . . . on the . . . day of . . . 1878, in the county of . . . , and State of Iowa, did have in his possession five certain pieces of false and counterfeit silver coin, counterfeited in the likeness and similitude of good and legal coin, current within the State of Iowa, by the laws and usages thereof, known as and called half dollars, and of the value of one half dollar each, with intent then and there the said counterfeit coin to utter and pass, the said A B then and there well knowing the same to be false and counterfeit, contrary, etc.

Approved in *State v. Williams*, 8 Iowa, 533.

Or, under same section, for counterfeiting coin:

. . . did unlawfully and feloniously counterfeit a certain piece of gold coin, current within the State of Iowa by the laws and usages thereof, called and known as a dollar, and of the value of one dollar.

Or under section 3920:

. . . did unlawfully and feloniously counterfeit a certain note, purported to be issued by the First National Bank of Marion, Iowa, commonly called a bank note, and of the denomination of five dollars, with intent to defraud, etc.

Or for passing counterfeit coin:

. . . did unlawfully and feloniously utter and pass, as true and genuine, ten certain pieces of gold coin, counterfeited in the likeness and similitude of good and legal gold coin, current within the State of Iowa, and by the laws and usages thereof called gold dollars, to one J S, the said A B then and there well knowing the same to be false and counterfeit.

Or under section 3922.

. . . did unlawfully utter and pass (or tender in payment as true) one certain

counterfeited promissory note [here copy note], knowing the same to be false and counterfeited with the intent to defraud, the said A B then and there knowing the said note to be false and counterfeit.

Or under section 3924:

. . . did unlawfully and feloniously engrave and make a certain plate, the same being then and there an instrument and implement, adapted and designed for the making of counterfeit bills in the similitude of five dollar bills issued by the First National Bank of Marion.

Or:

. . . knowingly and feloniously did have in his possession a certain pattern, tool and instrument, adapted and designed for coining and making counterfeit coin in the similitude of one side of a certain gold coin known and called a dollar, which represents . . . and has engraved thereon the words . . . and being current by the laws of Iowa, with intent then and there to use the same in making such counterfeit coin.

INDICTMENT—NAME OF PARTY TO WHOM COUNTERFEIT WAS PASSED.

The name of the person to whom the counterfeit money was passed should always be set out, and if not known the indictment should so state. *Buckley v. State*, 2 G. Greene, 164; 5 Blackf., 280.

NAME OF BANK OR PARTY INTENDED TO BE DEFRAUDED NOT NECESSARY.

Under section 4313, Code of 1873, which is the same as section 2927, Code of 1851, it is *held* that it is not necessary to set out the name of the corporation or person intended to be defrauded. *State v. Newland*, 7 Iowa, 243.

STATE—UNITED STATES.

Where the indictment charges that the coin was counterfeited in the similitude of coin current by usage in the State of Iowa, it was sufficiently described. It was not necessary to charge that the coin was counterfeited in the similitude of the current coin of the United States. *State v. Williams*, 8 Iowa, 535.

VALUE.

It is not necessary to charge that the counterfeit coin was of any value. To charge that the pieces were half dollars is sufficient. *State v. Williams*, 8 Iowa, 535.

COUNTERFEIT APPARATUS.

An indictment for having possession of counterfeit apparatus should describe the apparatus, and that it was knowingly retained. *State v. Atkins*, 5 Blackf., 573.

PASSING BANK NOTES.

The indictment should set out a copy of the note counterfeited, but not the devices. *State v. Atkins*, 5 Blackf., 458.

DUPLICITY.

To allege in three different counts, counterfeiting, having in possession counterfeit bills, and having less than five pieces with intent to pass, does not charge more than one offense. The charge is substantially for the same offense. *State v. McPherson*, 9 Iowa, 55.

HAVING IN POSSESSION WITH INTENT TO PASS.

An indictment for having in possession counterfeit notes with intent to pass the same, need not set out an intent to circulate in any particular county. *Spence v. State*, 8 Blackf., 281.

EXCEPTIONS—WHAT NEED NOT BE SET OUT.

The indictment need not allege that the defendant was not employed in the mint of the United States. *Harlan v. People*, 1 Douglas (Mich.), 207.

AS AGAINST THE STATE.

An indictment under the State laws properly charges the offense to have been committed against the State, instead of the United States. *Harlan v. People*, 1 Douglas (Mich.), 207.

COPY OF COUNTERFEITED BILL.

Under a Michigan statute, laws 1855, page 142, declaring that it shall not be necessary to set forth any copy of the instrument, but sufficient to describe in a general way, *held*, that a copy need not be set out. *People v. Stewart*, 4 Mich., 659.

INDORSEMENT OF BILL.

The indictment need not set out an indorsement on the back of the alleged counterfeit. *Hess v. State*, 5 Ohio, 6.

HAVING IN POSSESSION—DESCRIPTION OF BILLS.

It is held in Ohio, that the bills should be described specifically, under a charge of having possession of counterfeit bank bills and passing the same. *McMillen v. State*, 5 Ohio,

269; *Dana v. State*, 2 Ohio St., 91; Whart. Cr. Law, 587; *Griffin v. State*, 14 Ohio St., 60.

DESCRIPTION—PARTICULARITY.

It is not necessary to the validity of an indictment, to set out the number of the bill, its vignettes, mottoes and devices, or the words and figures in the margin. *Com. v. Bailey*, 1 Mass., 62; *Com. v. Stevens*, Ib., 204; 3 Johnson's Cases, 298; 2 Biney, 332; *State v. Carr*, 5 N. H., 367; Wharton's Am. Cr. Law, 588; *Griffin v. State*, 14 Ohio St., 61.

REPUGNANCY.

An allegation of "uttering false, forged and counterfeit bank notes," is not bad for repugnancy. *Mackey v. State*, 3 Ohio St., 363.

JURISDICTION—STATES—UNITED STATES—FEDERAL COURTS.

Congress has not restricted the power of the States. The general government has not, either expressly or impliedly by its statutes, prevented the punishment by States. *State v. McPherson*, 9 Iowa, 55; Bishop's Cr. Law, sections 613, 655; Whart. Cr. Law, sections 47, 349; *Harlan v. People*, 1 Douglass (Mich.), 207; *State v. Antonio*, 3 Wheeler's Cr. Cases, 508; 2 Bail's S. C., 44; 1 Blackf., 198; *Sutton et al. v. State*, 9 Ohio, 133; 7 Am. Law Register, 260, and authorities cited.

ELEMENTS CONSTITUTING COUNTERFEITING—HAVING IN POSSESSION AND WITH INTENT TO PASS—PROOF—INTENT.

Proof of an intent to pass, or tender in payment as true, the counterfeit coin made by defendant, is not essential to constitute the crime of making counterfeit money, only the presumption is that defendant made it for an evil purpose, and the presumption must be rebutted by the defendant. *State v. McPherson*, 9 Iowa, 58.

HAVING IN POSSESSION OR CONTROL.

Where a defendant is charged with having in his possession counterfeited coin, it is not necessary that the prisoner shall have the counterfeit coin in his hands, or in his pocket, or on his person; but if in the county, under his care and control, this constitutes a possession by defendant. *State v. Washburn*, 11 Iowa, 245.

PROCURING ONE TO PASS.

Where the defendant procures an ignorant boy to pass a counterfeit bank note, it is a sufficient passing by defendant. *Com. v. Hill*, 11 Mass., 136.

ILLEGAL INCORPORATION OR EXISTENCE OF A BANK.

If it should appear that the bank on which the defendant counterfeited a note, with intent to defraud, was never legally organized or constituted, no conviction can be had. *De Bow v. People*, 1 Denio, 9.

FOREIGN COIN.

Foreign coin is made current by the laws of the United States and different States of America, and its impress only shows that its value is certified by that government, to be in accordance with the laws of that country. *Harlan v. People*, 1 Douglass (Mich.), 209.

DRUNKENNESS, DEFENSE.

While drunkenness is no excuse for crime, yet, on a charge of passing counterfeit money, if defendant was so drunk that he actually did not know that he had passed a bill that was counterfeit he is not guilty. The essence of this crime is "knowingly passing it." *Pigman v. State*, 14 Ohio, 556.

DEFENSE—PROHIBITION OF FOREIGN BILLS.

The fact that a statute exists prohibiting the passing of certain bills, is no defense. The bills would still retain their value without the State. *Thompson v. State*, 11 Ohio St., 356.

PRESENTATION AND NON-PAYMENT OF FORGED DRAFTS.

The fact that a forged draft is not paid when presented and returned, does not relieve a defendant. It is still uttering and publishing, within the meaning of the statute. *People v. Bingham*, 2 Gibbs, Mich., 550.

DRAFT PAYABLE TO BEARER.

A draft that is made payable to bearer, without a payee being named, is nevertheless an order for money. *People v. Bingham*, 2 Gibbs, Mich., 550.

HAVING POSSESSION WITH INTENT TO SELL.

On an indictment for having in possession, counterfeit bills

on a foreign bank, with intent to barter the same, the State is not bound to prove it to be an incorporated bank by its charter. *Sasser v. State*, 13 Ohio, 453; 12 Wheat., 70.

HAVING POSSESSION OF COUNTERFEIT NOTES—INSTRUCTIONS.

It is error to charge the jury that evidence of the possession of counterfeit bank paper with intent to utter and publish as genuine, would support an indictment for being detected with counterfeit paper in possession, for the purpose of selling. *Van Valkenberg v. State*, 11 Ohio, 404; *Hutchins v. State*, 13 Ohio, 198; *Bevington v. State*, 2 Ohio St., 163.

HAVING IN POSSESSION COUNTERFEIT MONEY, PROOF.

Under a charge for having counterfeit money in possession with intent to pass it, the fact must be proved by positive evidence. The intention to pass may be proved from circumstances. *People v. Gardner*, 1 Wheeler's Cr. Cases, 23.

HAVING POSSESSION OF COUNTERFEIT TOOLS WITH INTENT TO USE THEM, EVIDENCE.

On a charge of having tools with intent to use them, the defendant cannot give in evidence, his declaration to an artificer at the time he employed him to make the instrument, as to the purpose he intended to use them for. 6 Metc. 231; Whart. Cr. Law, 240-259; *Shuck v. Vanderverter*, 4 G. Greene, 264; *State v. Cruise*, 19 Iowa, 317.

POSSESSION OF TOOLS WITHOUT PROOF OR ALLEGATION OF INTENT.

Under a Massachusetts statute of 1805, the having in possession materials for counterfeiting, without an allegation or proof of an intent to use them is no crime. *Com. v. Morse*, 2 Mass., 128.

EVIDENCE GENERALLY.

Evidence by a witness of the identity of a counterfeit bill, if the same was not in his possession all of the time, is inadmissible, unless he can identify it by some private mark. *Com. v. Kinison*, 4 Mass., 646.

LAWFUL EXISTENCE OF A BANK.

Under the Michigan statute, which provides that "the lawful existence of any bank out of this State shall be presumed upon evidence that such bank is actually engaged in the bus-

iness of a bank;" evidence of a general reputation in the community of the existence of a bank in another State, and that its bills pass current, is admissible to show that there was, *de facto*, a bank and the weight of the evidence is for the jury to determine. *Jennings v. People*, 8 Mich., 81; *Johnson v. People*, 4 Denio., 364; *Sasser v. State*, 13 Ohio, 486; *Reed v. State*, 15 Ib., 217; *People v. Carge*, 12 Wendell, 547; *People v. Davis*, 21 Ib., 309; *People v. Chadwick*, 2 Park Cr. Cases, 163.

PROOF—BANK—INCORPORATION—CHARTER.

Under section 3934 of the Iowa Code of 1873, which is the same as section 2643 Code of 1851, it is held unnecessary to prove the incorporation of a bank, by the charter, or act thereof, but the same may be proved by general reputation. *State v. Newland*, 7 Iowa, 243.

PROOF.

Proof of uttering and publishing a counterfeit bank note as true and genuine, will not sustain a charge for selling such note. *Vanvalkenburg v. State*, 11 Ohio, 404.

EXPERTS.

Experts may be called to prove that the note is counterfeit, though they may never have seen the officers of the bank write. *May v. State*, 14 Ohio, 461.

PROOF OF OTHER COUNTERFEIT NOTES.

It is competent to prove that the defendant has passed other counterfeit paper, without producing it, if it be out of the jurisdiction of the court. *Reed v. State*, 15 Ohio, 217.

HAVING POSSESSION OF SPURIOUS BANK NOTES.

On a charge of having possession of spurious bank notes, it is not competent for the State to prove that appliances and material for the manufacture of spurious coin, were found in the possession of the accused. *Bluff v. State*, 10 Ohio St., 547.

PROOF OF ACTS OF A CO-DEFENDANT.

Proof of spurious notes being in the possession of a co-defendant, or particeps criminis, is inadmissible as against the defendant on trial. *Griffin v. State*, 14 Ohio St., 56.

GUILTY KNOWLEDGE, PROOF OF.

To prove the guilty knowledg of an utterer of a forged bank note, evidence may be given of his having previously uttered other forged notes knowing them to be forged. 1 Leading Cr. Cases, 185.

VERDICT.

The jury need not describe in their verdict, the coin and its value, or that defendant knew the same to be counterfeit. Simply, that the defendant is guilty as charged in the indictment, is sufficient. *State v. Williams*, 8 Iowa, 535.

FORGERY.*

DEFINITION.

Forgery is the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might be apparently of legal efficacy, or the foundation of a legal liability. *State v. Pierce*, 8 Iowa, 235; *State v. Thompson*, 19 Ib., 303; or, the false making or altering of such writing as either at common law or by statute, are its objects, with intent to defraud another (2 East., p. 852; 1 Wheeler's Cr. Cases, 210); or the fraudulent making or altering of a writing to the prejudice of another's right; or the making of a false instrument with intent to deceive, or the false making of an instrument which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud; or the false making of a note or other instrument with intent to defraud. *People v. Fitch*, 1 Wendell, 200; Roscoe's Cr. Ev., 7th ed., 514, 539; *Snyder v. Reno*, 38 Iowa, 333; *State v. Wooderd*, 20 Ib., 547; *State v. Johnson & Johnson*, 26 Ib., 418.

Form of Indictment under Section 3917.

THE STATE OF IOWA } District Court of the county of term, 1878.
vs. } Forging a receipt with intent to defraud.

. That A B, a resident of . . . county, did falsely make and forge an instrument in writing in the language and figures following, to-wit (here set out a copy of the receipt): The said writing purporting to be the act of the said . . . , and to create a pecuniary demand against the said . . . , and with intent to defraud, contrary, etc.

*As some of the sections on counterfeiting also apply to forgery, it was thought best to place the chapters on counterfeiting and forgery, together, and then the decisions, with forms, first on counterfeiting, second on forgery.

Or, under the same section, for forging a certificate of a justice to the board of supervisors:

That one . . . was justice of the peace, and as such authorized by the board of supervisors to count and destroy gopher scalps produced before him, and make and issue his certificate of such counting and destruction to the parties producing the same before him; that said certificates were taken and received by the said supervisors as legal proof of the counting of said scalps, for the purpose of issuing warrants thereon to the holders thereof on the treasury of the county, as the county authorized by them for the destruction of said gophers; that the county board allowed fifteen cents for each scalp aforesaid; that said defendant, on the said . . . day of . . . willfully and unlawfully, and with intent to defraud, did make, forge, and counterfeit a certain certificate, purporting to be a certificate which had been duly issued by the said . . . as a justice of the peace as aforesaid, as evidence to the board of supervisors of the counting and destruction of gopher scalps, which said false and forged certificate is of the purport and effect following, to-wit (here copy): contrary, etc.

Approved in *State v. Johnson & Johnson*, 26 Iowa, 407.

Or for forging an order:

. . . feloniously did falsely make, forge and counterfeit a certain instrument in writing commonly called an order, which said false and forged instrument is as follows (here copy order): with intent to injure and defraud the Meriden Cutlery Co. and divers other persons, contrary, etc.

Approved in *People v. Noakes*, 5 Park. Cr. R. 291, and this decision was approved in *Noakes v. People*, 25 N. Y., 390.

Or for forging a deed:

. . . did falsely and fraudulently forge a certain deed, purporting to be the act of one . . . by which a right or interest in real property was transferred and conveyed. A true copy of said forged deed is as follows (here copy deed): the same being so unlawfully forged by the said defendant with intent to defraud, contrary, etc.

Approved in *Paige v. People*, 6 Park. Cr. R., 683.

Or forgery of a will:

. . . did falsely and fraudulently make and forge a certain will, purporting to be the last will and testament of one . . . with intent to defraud. A copy of said will is as follows (here copy): contrary, etc.

Or a bank note:

. . . did unlawfully forge a certain note of the bank of . . . commonly called a bank note, which said forged note is in words following (here copy): with intent to defraud, contrary, etc.

Or for uttering and passing as true a note:

The said . . . had in his custody and possession a certain false and forged promissory note, the said . . . then and there knowing the same to be false and forged, and which forged note is as follows (here copy): and that the said . . . then and there did feloniously utter and pass the same as true, and with intent then and there to defraud, contrary, etc.

Or uttering and passing a forged county order:

. . . did unlawfully utter and pass as true, a certain county order, purporting to be drawn by . . . the auditor of Linn county, Iowa, upon the treasurer of said county, and payable to . . . with intent to defraud, contrary, etc.

INDICTMENT—NAME OF BANK OR PARTY DEFRAUDED.

It is deemed not necessary to set out in the indictment the name of the bank or person defrauded, or intended to be defrauded; but if the same is set out, it is incumbent on the State to prove. Nor is it necessary to set out that a bank or

corporation was duly incorporated. *Com. v. Smith*, 6 S. & R., 568; *State v. Pierce*, 8 Iowa, 233; *State v. Newland*, 7 Ib., 242; Roscoe's Cr. Ev., 7th ed., 532; *Turpin v. State*, 19 Ohio St., 540; sections 3934 and 4313, Code of 1873, which is the same as the Code of 1851, under which these decisions were made.

INTENT TO DEFRAUD.

The indictment must allege that the act was done with intent to defraud. 2 Ind., 23. And the intent should be averred in the body of the indictment, and not as a mere conclusion. *Drake v. State*, 19 Ohio St., 211.

MORTGAGE—RECEIPTS.

The charging of the forging of a mortgage, and a receipt on the mortgage, is charging two crimes, and is bad for duplicity. *People v. Wright*, 9 Wendell, 193.

EXISTENCE OF MORTGAGED PROPERTY.

The indictment should aver that the property described in the mortgage is in fact in existence. *People v. Wright*, 9 Wendell, 193.

PARTNERSHIP—INDIVIDUAL NAME.

Where the indictment set out an intent to defraud A, and it appeared that he was one of a firm, the failure to give the firm name, is not fatal. *Stoughton & Hudson v. State*, 2 Ohio St., 564; *People v. Curling*, 1 Johnson, 320; *State v. Hastings*, 2 Green, Cr., 335.

BANK CHECK—ADDRESS.

A check on a bank, charged in an indictment for forgery to be addressed to the cashier thereof, is correctly described, where the check is in the form of a letter addressed on the back thereof to the cashier, although in the inside of the letter there be no direction whatever. *People v. Gumaer*, 9 Wendell, 271.

INDORSEMENT OF CHECK.

On an indictment for forging a check, it is not necessary to set forth the indorsement appearing upon the check, or a stamp, as neither form a part of the check. *Hess v. State*, 5

Ohio, 9; *Com. v. Ward*, 2 Mass., 397; 3 Johnson's Cases, 299; *Miller v. People*, 52 N. Y., 304.

FORM, CHARGING PART.

It is not necessary to allege that it was an instrument purporting to be the act of another. To set out that the defendant did forge a certain check, and setting out a copy, is sufficient *People v. Rynders*, 12 Wend., 429

CHARGING TWO OFFENSES—FORGING—UTTERING.

While it is true that two separate and distinct offenses should not, and cannot, be charged in one indictment, but when offenses of the same character, differing only in degree, are united in the same indictment, the prisoner may be tried on both charges. For instance, where a defendant is charged with forgery, and also for forging and passing as true, both may be alleged, if in separate counts. *People v. Rynulers*, 12 Wendell, 429; *People v. McKinney*, 10 Mich., 54, 95; *Van Sickel v. People*, 29 Ib., 63; *State v. McPherson*, 9 Iowa, 53; *State v. Nichols*, 38 Ib., 110; *State v. Hastings*, 2 Greene Cr. R., 339; 53 N. H., 452.

DUPPLICITY.

Where the same section of a statute makes two or more distinct acts connected with the same transaction indictable, they may be coupled together, not only in the same indictment, but in the same count. *State v. Hastings*, 2 Greene Cr. R., 339; 27 Vermont, 310; 4 Cushing, 74; 1 Whart., 6th ed. Sec., 390; 2 Ib., Sec., 1466.

LOST INSTRUMENT.

On an indictment for forging a promissory note, if the note be lost or destroyed, it is sufficient to set forth the substance thereof, alleging the loss. *People v. Badzley*, 16 Wendell, 53; *Dana v. State*, 2 Ohio St., 92.

VALUE.

The indictment need not allege that the forged instrument was of a certain value. *Chidester v. State*, 25 Ohio St., 437.

INSTRUMENT MUST SHOW ON ITS FACE THAT THE RIGHTS OF PARTIES ARE AFFECTED.

The indictment must set out an instrument from which it

appears on its face, that the rights and property of parties are affected or injured. *People v. Stearns*, 21 Wend., 409; *Clark v. State*, 8 Ohio St., 630.

ALTERATION OF FORGED INSTRUMENT.

Where a genuine instrument is altered, the forgery may be specially alleged as shown by the alteration, or the forgery of an entire instrument may be alleged. 2 Ired., 491; *People v. Brotherton*, 2 Green Cr. R., 451.

REPUGNANCY.

An indictment which charges a bank bill to have been false, forged, altered, and counterfeited, is repugnant. *Kirby v. State*, 1 Ohio St., 185.

INSTRUMENT, COPY.

A copy of the forged instrument should always be set out, that the prisoner may know what he is properly charged with, and the court advised whether the acts constitute a crime. *Com. v. Houghton*, 8 Mass., 107; *State v. Callendine*, 8 Ib., 288; *State v. Johnson & Johnson*, 26 Ib., 414; 6 Term R., 162; 1 East., 180; 6 Whart. Crim., Law, 345. So, the setting out the original notes and the same note after it had been changed, is held good. *State v. Knowles*, WESTERN JURIST, December No., 1877, page 726; *McMillen v. State*, 5 Ohio, 169; *Dana v. State*, 2 Ohio St., 92; 3 Chitty's Cr., Law, 1040. But the figures and numbers on the margin of a bill are not necessarily to be set out. *Com. v. Bailey*, 1 Mass., 62; *Com. v. Stevens*, Ib., 202.

PURPORT—EFFECT—TENOR—CONSTRUCTION.

The words "Tenor," "as follows," "that is to say," and the like, have all been held to import an accurate copy and sufficient. While the words "purport," and "effect," do not import it, but have an entirely different meaning, both in ordinary use and legal signification, and mean no more than the substance, and an indictment setting out that the following is the "purport and effect," is not sufficient, and is demurrable. 3 Chitty's Cr. Law, 1040; Archibald Crim. Pl., 42; 2 Leach., 657; 2 East. P. C., 983; Russ. on Crimes, 372; Lewis' United States Cr. Law., 648; 1 East., 173; Ib., 183; *State v. Atkins*, 5 Blackf., 458; 1 Vt., 298; *McMillen v. State*, 5 Ohio, 269;

Com. v. Houghton, 8 Mass., 110; *Dana v. State*, 2 Ohio St., 92; *State v. Johnson & Johnson*, 26 Iowa, 414. Purport and effect held to be sufficient.

EXTRINSIC FACTS—IMPORT—INUENDO.

An indictment which alleges that an instrument was forged, which was written, "M. C. & Co., pay B. \$——, J. L. C.," with intent to defraud, is insufficient, unless the indictment contains the proper inuendo, or the averment of extrinsic facts, fully explaining the meaning of the letters and words, or shows or points out in what particular the forgery was done. The writing here set out does not purport to be drawn by, or on any person, natural or artificial. *Clark v. State*, 8 Ohio St., 630; *Carberry v. State*, 11 Ib., 410; *Bynam v. State* 17 Ib., 143; Starkie's Cr. Pleading, 113; 2 Leach. Cr. Law, 711; 1 Moody Cr. Cases, 141; *People v. Marion*, 28 Mich., 256; *Chidester v. State*, 25 Ohio St., 437; *People v. Stearns*, 21 Wendell, 413; *State v. Harrison*, 1 Green Cr. R., 537; *State v. Wheeler*, Ib., 541.

CHECK—INDORSEMENT—REVENUE STAMP.

The indorsement on a check or revenue stamp attached, forms no part of the instrument and need not be copied or set out in the indictment. *Com. v. Ward*, 2 Mass., 397; *Hess v. State*, 5 Ohio, 9; 2 Russ. on Crimes, 460; 5 Johnson's Cases, 299; *Miller v. People*, 52 N. Y., 304; *State v. Mott*, 10 Am. R., 152; *Miller v. People*, 11 Ib., 706; *State v. Mott*, 16 Minn., 472.

INSTRUMENT—WRITTEN, PRINTED, NECESSITY OF ALLEGING.

It is not necessary in an indictment for forgery, to allege that the instrument, or its pretended signature, was or is in writing or printing, provided the whole instrument is set out. *People v. Rynders*, 12 Wendell, 431; *People v. Rhoner*, 4 Park. Cr. R., 173.

GOODS—PROPERTY—CONSIDERATION PASSING.

It is not necessary to allege that the property, or a consideration passed. The false making with intent to defraud is the gist of the offense. *Com. v. Ladd*, 15 Mass., 526; *State v. Pierce*, 8 Iowa, 234.

GENUINENESS—VALIDITY OF INSTRUMENT.

It is not necessary to allege the genuineness or validity of the instrument. *State v. Pierce*, 8 Iowa, 234.

ELEMENTS.

The making or altering of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery. And it is not essential that any person should be actually injured, but is sufficient that the instruments, if genuine, would be the foundation, or the evidence of another's liability. A material alteration, in part, of a genuine instrument whereby a new operation is given to it, is a forgery of the whole, though it may be only as to a letter or figure. 13 Geo., 1; 2 E. P. C., 861; *Barnum v. State*, 15 Ohio, 717; 1 Hawk. P. C. Ch. 70, Sec. 2; *State v. Wooderd*, 20 Iowa, 547; *State v. Johnson & Johnson* 26 Ib., 418; 26 Me., 312; *Stoughton & Hudson v. State*, 2 Ohio St., 566; *People v. Brotherton*, Green Cr. R., 451; 47 Cal., 388; 2 Whart. Cr. Law, Sec. 1421; *People v. Graham*, 6 Park. Cr. R., 135.

INSTRUMENT, LEGAL EFFICACY.

While there can be no forgery of an instrument invalid upon its face, yet it is not necessary that it should have actual legal efficacy. *State v. Johnson & Johnson*, 26 Iowa, 407.

ANIMAL SCALPS, BOUNTY CERTIFICATES.

The certificate of a justice, certifying as to the counting and destruction of gopher scalps, for which a bounty has been offered, is the subject of forgery. *State v. Johnson & Johnson*, 26 Iowa, 407.

WRITTEN INSTRUMENTS, ALTERATION OF.

The detachment from a written instrument of a condition thereto, whereby the writing is changed from a non-negotiable instrument to a negotiable note, is forgery. 1 Hawk. P. C., Ch. 70, Sec. 2; 2 East. P. C., Ch. 19, Sec. 4; 2 Leach, 1040; *State v. Stratton*, 27 Iowa, 420.

GOODS—PROPERTY IN HANDS OF DRAWEE.

It is immaterial whether the person whose name was forged had money, or goods in the hands of the drawee. *Com. v. Fisher*, 17 Mass., 46.

DEFENSE—STAMP—SUNDAY.

It is no defense to an indictment for forgery that the note alleged to be forged was not stamped, or was made on Sunday. *State v. Mott*, 10 Am. R. 152; 16 Minn., 472; *Van Sickle v. People*, 29 Mich., 61.

UTTERING AND PUBLISHING.

The presentation of a forged draft or order for money, to the person to whom it purports to be directed for payment thereof, knowing the same to be forged, though payment is refused, and the draft returned, is uttering and publishing within the meaning of law. *People v. Brigham et al.*, 2 Gibbs, Mich., 550.

DRAFT PAYABLE TO BEARER, NO NAME INSERTED.

The fact that no name was written in the draft, where it was made payable to bearer, made it none the less an order for money. *People v. Brigham*, 2 Gibbs, Mich., 550.

MORTGAGE, WRITTEN INSTRUMENTS.

A mortgage is a written instrument within the meaning of the law, and subject to forgery. *People v. Caton*, 25 Mich., 388.

UTTERING—RECEIVED AS GENUINE.

To constitute the uttering of a forged instrument, it is necessary that it should have been actually received as genuine. To utter, is to offer, whether it be taken or not. It is to declare or assert indirectly if not directly by words or actions that it is good. 2 Den. C. C., 78; 2 Binn., 339; *People v. Rathbun*, 21 Wendell, 528; 2 Leach, 978; *People v. Caton*, 25 Mich., 392; *Perkins v. People*, 27 Mich., 386.

UTTERING—THE RECORDING OF FORGED MORTGAGE—RECEIVING.

To place on record a forged mortgage, and receipting for money, and making an indorsement thereof on the forged paper, implies an assertion of its genuineness, and is a sufficient uttering as true. *Perkins v. People*, 27 Mich., 389.

INDORSEMENT OF NOTE, FORGERY OF.

The indorsement of a note is the subject of forgery, though the word "indorsement" is not mentioned in the Ohio law

under which this decision is made, while the Iowa Code contains the word "indorsement." *Poage v. State*, 3 Ohio St., 233. And see, also, authorities holding that an indorsement is a new and independent contract. *Hess v. Fox*, 10 Wendell, 439; 2 East., 481; 2 Burr, 674; 6 Cranch, 221; *Hawkins v. Hulburd*, 10 Ohio, 180.

So where one who, with intent fraudulently to utter a note as the note of a person other than the signer, procures to it the signature of an innocent party, who does not thereby intend to bind himself, he is guilty of forgery. *Com. v. Foster*, 19 Am. R., 353; 114 Mass., 311.

ORDER—REQUEST.

An instrument of writing in the following language, was held to be the subject of forgery: "Wen. 19th. Mr. Davis. Please let the boy have \$6.00 for me. B. W. Earl." *Evans v. State*, 8 Ohio St., 196. Or, "Please let Mr. Borswick have his clothes, and I will hold his pay till next Tuesday, and will see that paid for. J. B." Held that such is an order for the delivery of goods and chattels, and subject to forgery. *Chidester v. State*, 25 Ohio St., 433. For a full discussion see, *People v. Stearns*, 21 Wendell, 411.

CHANGE OF DATES IN A NOTICE OF A CAUSE—DEFENSE.

The altering or changing a date in a notice pending in a proceeding in court, does not come within the provisions of the statute "to alter an instrument in writing by which rights or property of another are affected," and is not the subject of forgery. *People v. Cady*, 6 Hill, 490.

ORDER—REQUEST, NOT ADDRESSED TO ANY PARTICULAR PERSON.

The making of a counterfeit order for the delivery of goods in the name of a third person, is forgery, though the paper be not addressed to any one. *Noakes v. People*, 25 N. Y., 380.

NAME OF CORPORATION OR PARTNERSHIP.

To allege as the name, "The Meridan Cutlery Co.," is a sufficient designation of the body partnership, or persons intended to be defrauded. It is immaterial whether it was or was not incorporated, or what was its constitution. It is

enough to show an existing body of persons, capable of being defrauded. *Noakes v. People*, 25 N. Y., 380.

CERTIFIED BANK CHECK.

A certified bank check is an instrument as an entirety, and comes within the statute of forgery. The certificate and check are two different instruments, and the forging of either makes out the crime. *People v. Clement*, 26 N. Y., 198.

UTTERING.

The showing of a forged receipt to one with whom the defendant is claiming credit on account of that receipt, is an uttering. *Reg. v. Radford*, 1 Leading Cr. Cases, 397; *Ib.*, 400.

PROMISSORY NOTE—ACQUITTANCE.

The giving of a promissory note is not an acquittance or discharge of a debt. *People v. Hoag*, 2 Park. Cr. R., 36.

BANK NOTES—BILLS PRINTED.

Bank bills wholly printed or engraved, are the subject of forgery. *People v. Rhoner*, 4 Park. Cr. R., 166.

NAME OF PRISONER SIGNED TO FORGED INSTRUMENT.

A person may be guilty of forgery, in writing his own name to an instrument, if done with intent to defraud, by representing himself to be a different person of that name. 4 T. R., 28; *People v. Rhoner*, 4 Park. Cr. R., 172.

EVIDENCE—PROOF—VARIANCE.

A mere technical variance between the evidence and charge should be disregarded. *State v. Thompson*, 19 Iowa, 299.

PLACE—VENUE—PROOF.

Where the defendant resides in a certain county, and a forged instrument is produced on the trial in that county, it may be considered by the jury as tending to show that the forgery was committed in the same county. *State v. Thompson*, 19 Iowa, 299.

RECEIPTS—PROOF OF PAYMENT COMPETENT.

It is proper for the defendant to show that he paid the amounts named in the receipts, and for which he received the receipts. *State v. Woodard*, 20 Iowa, 551.

DEFENSE—AMOUNTS DUE PRISONER.

Evidence that the amounts for the defendant's forged receipts were actually due him is inadmissible, though the debt may be just. A man has no right to receipt, or fabricate writings, as evidence of such sums. The charge of forgery cannot be negatived by proof that the claim was in reality a just one. *State v. Wooderd*, 20 Iowa, 553; 2 Moody & Cr., 300; 2 Humph. (Tenn.), 494; 1 Den. Cr. Cases, 282; 2 Bish. Cr. Law S., 492.

SIGNATURE, INTRODUCTION OF.

The instrument claimed to be forged, is admissible as evidence, and it is a matter of fact for the jury to determine as to whether the crime is made out or not. *State v. Nichols*, 38 Iowa, 110.

WRITTEN DOCUMENTS—PROTEST, INADMISSIBLE, WHEN.

A letter from the cashier of a bank, or the protest of a notary, is not admissible as evidence against the defendant, upon the general principle that a prisoner has a right to meet his witnesses face to face. *Farrington v. State*, 10 Ohio, 354.

VARIANCE—INDICTMENT—PROOF.

Proof of a note under seal, does not support an indictment which charges the forging of a note not under seal. *Hart v. State*, 20 Ohio, 49.

If the variance is plain, such instrument ought not to be allowed to go in evidence; but if the forged name is uncertain and susceptible of being read, it ought to be submitted to the jury. *Turpin v. State*, 19 Ohio St., 540.

ADMISSIONS.

Evidence of admissions on the part of the prisoner, of the commission of other forgeries is inadmissible. *People v. Corbin*, 15 Am. R., 427; 36 N. Y., 363.

FRAUD.

The principal element in forgery consists in the fraudulent purpose, and the proofs of fraud must be substantially the same in criminal as in civil cases, and all the surrounding circumstances are admissible. *People v. Marion*, 39 Mich., 37.

CERTIFICATES—DATES—EXECUTED ON SUNDAY.

It is proper to introduce the forged certificate, though the same may have been executed on Sunday. *Van Sickle v. People*, 29 Mich., 63.

FIRM—INDIVIDUAL NAME, PROOF OF.

Where the defendant is charged with a forgery on a firm with intent to defraud A B & C D, and no evidence that A B & C D, composed said firm, the defendant could not be convicted. *State v. Harrison*, 1 Green Cr. R., 537; 69 N. C., 143.

FIRM NAME—INTENT TO DEFRAUD.

An intent to defraud a firm necessarily includes an intent to defraud each member of it. *State v. Hastings*, 2 Green Cr. R., 334; 53 N. H., 452.

PROOF—EXISTENCE OF A BANK—PAROL EVIDENCE.

Where a defendant is charged with forging, and uttering and publishing forged bank bills, parol evidence is admissible to prove the existence of such bank without its charter. *People v. Davis*, 21 Wend., 309; *Dennis v. People*, 1 Park., Cr. R., 469; *People v. Chadwick*, 2 Ib., 163.

EXPERTS—HANDWRITING, PROOF OF.

Where witnesses disagree as to the genuineness of the signature, comparison of hands is admissible. *People v. Hewitt*, 2 Park. Cr. R., 20.

HANDWRITING, HOW PROVED.

It is well settled that the handwriting may be proved by the admission of the defendant or comparison with other writings. 2 Whart. Cr., Law, Sec., 1463; *Johnson v. Daverne*, 19 Johnson, 134; *State v. Hastings*, 2 Green Cr. R., 341; 53 N. H., 452.

EXPERT—COMPARISON—HANDWRITING.

Experts may make comparisons between the writing in dispute and other writings which are either admitted or proved to be genuine, and their opinions thus formed may be given in evidence. *State v. Hastings*, 2 Green Cr. R., 334; 53 N. H., 452; 25 Ib., 110; 42 Ib., 111, 121, 122, and 46 Ib., 497; 9 Conn., 54; 17 Pick., 490, and in 39 Vt., 325, 336, the court

go still further and hold that the comparison may be made without waiting for any other evidence, derived from a knowledge of the handwriting, while a contrary doctrine is held in *People v. Spooner*, 1 Denio, 343.

FRAUD BY A PARTNER.

SECTION 2165. Every partner who shall be guilty of any fraud in the affairs of the partnership, shall be liable, civilly, to the party injured to the extent of his damage, and shall also be liable to an indictment for a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court by which he shall be tried. [Limitation, by section 4167, three years.]

FRAUDULENT CONVEYANCES.

SECTION 4074. Any person who knowingly being a party to any conveyance, or assignment of any estate or interest in lands, goods, or things in action, or of any rents or profits arising therefrom; or being a party to any charge on such estate, interest, rents, or profits, made or created with intent to defraud prior or subsequent purchasers, or to hinder, delay, or defraud creditors or other persons; and every person who, being privy to, or knowing of such fraudulent conveyance, assignment, or charge, puts the same in use as having been made in good faith, shall be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year. [Limitation by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA } District Court of the county of term, 1878.
vs. }

Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of fraudulently conveying lands to another with intent to defraud, committed as follows: That the said . . . in the county of . . . and State of Iowa, on the . . day of . . . , 1878, being the owner in fee of a certain tract of land, situate, lying and being in said county, and bounded and described as follows, to-wit (here insert the description): being then and there indebted to one C D in a large sum of money, to-wit: two thousand dollars, for the collection of which the said C D then lately before had commenced a suit in the district court of said county of . . . against the said A B, he, the said A B, did unlawfully and fraudulently convey the land aforesaid to one E F, with intent to hinder, delay and defeat the said C D in the collection of said debt, contrary to and in violation of law.

FRAUDULENT DESTRUCTION OF BOATS.

SECTION 4082. If any person cast away, sink, or otherwise destroy, any raft, boat, or vessel, within any county of this state, with intent to defraud any owner or insurer thereof; or the owner or insurer of any property laden on board the same,

or of any part thereof, he shall be punished by imprisonment in the penitentiary not exceeding five years, or fined not exceeding two thousand dollars and imprisoned in the county jail not exceeding one year.

SEC. 4083. If any person lade, equip, or fit out, or assist in lading, equipping, or fitting out, any raft, boat, or vessel, with intent that the same be cast away, burnt, sunk, or otherwise destroyed, to injure or defraud any owner or insurer thereof, or of any property laden on board the same, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. [Limitation by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA } District Court of the county of term, 1878.
vs. }

Indictment.

The grand jury of the county of in the name and by the authority of the State of Iowa, accuse . . . of the crime of fraudulently destroying a boat, committed as follows, to-wit: That the said . . . , on or about the . . . day of . . . , 187 . . , in the county of . . . and State of Iowa, did willfully, unlawfully and maliciously cut away and let loose a certain boat known as the . . . , then and there being landed and fastened on the premises of . . . , on Indian creek, said county and State, and being the property of . . . , by means of which acts of the said . . . , the said boat was totally destroyed, and then and there, with the intent to defraud the owner thereof, contrary to and in violation of law.

GENERAL REGULATIONS AFFECTING COUNTIES, TOWNS, AND CITIES.

SECTION 552. Public money shall not be appropriated, given, or loaned by the corporate authorities, supervisors, or trustees of any county, township, city, or town, or municipal organization of this state, to, or in favor of, any institution, school, association, or object, which is under ecclesiastical or sectarian management or control.

SEC. 553. No county, city, or incorporated town in the state, shall, in their corporate capacity, or by their officers, directly or indirectly, subscribe for stock, or become interested as a partner, shareholder, or otherwise, in any banking institution, whether the same be a bank of issue, deposit, or exchange, nor in any plank-road, turnpike, or railway, or in any other work of internal improvement; nor shall they be allowed to issue any bonds, bills of credit, script, or other evidences of indebtedness for any such purposes—all such evidences of indebtedness for said purposes being hereby declared absolutely void; *provided, nevertheless*, that this section shall not be so construed as to prevent, or in any wise to embarrass, the counties, cities, or towns, or any of them, in the erection of their necessary public buildings, bridges, laying off highways, streets,

alleys, and public grounds, or other local works in which said counties, cities, or towns may respectively be interested.

SEC. 554. All bonds, or other evidences of debt, hereafter issued by any corporation to any railway company as capital stock, shall be null and void, and no assignment of the same shall give them any validity.

SEC. 555. In all actions now pending or hereafter brought in any court in this state, on any bond or coupon issued, or purporting to be issued, by any county, city, or incorporated town for railway purposes, a former recovery against such corporation on any one or more, or any part of such bonds or coupons, shall not bar or estop any defense such corporation has made, or can make, to such bonds or coupons in the action in which such former recovery was had; but the corporation sought to be charged in any such action now pending or hereafter brought, may allege and prove any matter of defense in such action to the same extent, and with the same effect, as though no former action had been brought or former recovery had.

SEC. 556. No officer of any county or other municipal corporation, or any deputy or employe of such officer, shall, either directly or indirectly, be permitted to take, purchase, or receive in payment, exchange, or in any way whatever, any warrant, scrip, or other evidence of indebtedness of such corporation, or any demand against the same, for a less amount than that expressed on the face of the warrant, scrip, or other evidence of indebtedness or demand.

SEC. 557. The treasurer of every county, or other municipal corporation, when he shall receive any warrant, scrip, or other evidence of indebtedness of such corporation, shall endorse thereon the date of its receipt, from whom received, and what amount.

SEC. 558. Any officer of any county or other municipal corporation, or any deputy or employe of such officer, who violates any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars, and not more than five hundred dollars for each offense.

ILLEGALLY SOLEMNIZING MARRIAGES.

SECTION 2185. Marriage is a civil contract, requiring the consent of parties capable of entering into other contracts, except as herein otherwise declared.

SEC. 2186. A marriage between a male person of sixteen and a female of fourteen years of age is valid, but if either party has not attained the age thus fixed, the marriage is a

nullity or not at the option of such party made known at any time before he or she is six months older than the age thus fixed.

SEC. 2187. Previous to any marriage within this state, a license for that purpose must be obtained from the clerk of the circuit court of the county wherein the marriage is to be solemnized, agreeable to the provisions of this chapter.

SEC. 2188. Such license must not in any case be granted where either party is under the age necessary to render the marriage absolutely valid, nor shall it be granted where either party is a minor without the previous consent of the parent or guardian of such minor, nor where the condition of either party is such as to disqualify him for making any other civil contract.

SEC. 2189. Unless such clerk is acquainted with the age and condition of the parties for the marriage of whom the license is applied for, he must take the testimony of competent and disinterested witnesses on the subject.

SEC. 2190. He must cause due entry of the application for the issuing of the license to be made in a book to be procured and kept for that purpose, stating that he was acquainted with the parties and knew them to be of competent age and condition, or that the requisite proof of such fact was made to him by one or more witnesses, stating their names, which book shall constitute a part of the records of his office.

SEC. 2191. If either party is a minor, the consent of the parent or guardian must be filed in the clerk's office after being acknowledged by the said parent or guardian, or proved to be genuine, and a memorandum of such facts must also be entered in said book.

SEC. 2192. If the clerk of the circuit court grants a license contrary to the provisions of the preceding sections, he is guilty of a misdemeanor, and if a marriage is solemnized without such license being procured, the parties so married, and all persons aiding in such marriage, are likewise guilty of a misdemeanor.

SEC. 3967. Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.

The form of the indictment may be as follows:

THE STATE OF IOWA	District Court of the county of term, 1878.
VS.	
	<i>Indictment.</i>
The grand jury of the county of , in the name and by the authority of the	

State of Iowa, accuse . . . of the crime of illegally solemnizing a marriage, committed as follows: That the said G A, on the . . . day of . . . , 187 . . , being then and there a justice of the peace in and for the county of . . . and State of Iowa, and then and there having power and authority by virtue of his office, and by law authorized, to solemnize marriages, did then and there, in said county and State, unlawfully and knowingly solemnize a marriage between A B and C D, the said A B and C D not having obtained any license therefor, which the said G A, before and at the time of the solemnization of the said marriage, well knew, which said marriage was contrary to and in violation of law.

Or for the violation of a statute in granting a license to minors, the following form may be used :

That the said A B, on the . . . day of . . . , 18 . . , in the said county of . . . and State of Iowa, did issue a certain marriage license to one B S, to be used for the purpose of solemnizing a marriage between said B S and S K; whereas, the said B S at the time was a minor, to-wit: eighteen years of age, and not having the consent of his parent or guardian for said marriage; all of which the said A B well knew at the time, he being then and there clerk of the Circuit Court for Linn county, Iowa, unlawfully, knowingly, and contrary to and in violation of law.

JURISDICTION: JUSTICE OF THE PEACE.

The solemnizing of a marriage without a license is an indictable misdemeanor, and a justice of the peace has no jurisdiction to try and determine the complaint; but only the right to hear the complaint. *White v. State*, 4 Iowa, 449.

ILLEGITIMATE CHILDREN—BASTARDY.

SECTION 4715. When any woman residing in any county of the state is delivered of a bastard child, or is pregnant with a child, which, if born alive, will be a bastard, complaint may be made in writing, by any person, to the district court of the county where she resides, stating that fact, and charging the proper person with being the father thereof. The proceedings shall be entitled in the name of the state against the accused as defendant.

SEC. 4716. Upon the filing of the complaint, the clerk shall cause notice to be given to the person so charged as in an ordinary action.

SEC. 4717. From the time of the filing of such complaint, a lien shall be created upon the real property of the accused in the county where the action is pending, for the payment of any money and the performance of any order adjudged by the proper court.

SEC. 4718. If the complaint is verified, the district judge may order an attachment to issue thereon without bond, which order shall specify the amount of property to be seized under the attachment, and may be revoked at any time by such judge or the district court, on a showing made to either for the revocation of the same, and on such terms as such court or judge may deem proper in the premises.

SEC. 4719. The district attorney, on being notified of the

facts justifying a complaint as contemplated in section four thousand, seven hundred and fifteen of this chapter, or of the filing of such complaint, shall prosecute the matter in behalf of the complainant.

SEC. 4720. The issue on the trial shall be "guilty" or "not guilty," and shall be tried as an ordinary action.

SEC. 4721. If the accused be found guilty, he shall be charged with the maintenance of the child in such sum or sums, and in such manner as the court shall direct, and with the costs of the suit; and the clerk may issue execution for any sum ordered to be paid immediately, and afterwards, from time to time, as it shall be required to compel compliance with the order of the court.

SEC. 4722. The court may, at any time, enlarge, diminish, or vacate any order or judgment rendered in the proceeding herein contemplated, on such notice to the defendant as the court or judge may prescribe.

Form of Complaint.

THE STATE OF IOWA ON THE COM- PLAINT OF SARAH TIMMONS vs. WILLIAM ISAAC BENTON. LINN COUNTY. STATE OF IOWA. } ss.	In District Court of . . . county, Iowa. Bastardy. <i>Complaint.</i>
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I, Sarah Timmons, being duly sworn, upon oath do say that I reside in Marion, Linn county, Iowa, and have resided in said county and State for the past . . . years, and that I was, on the . . . day of . . . , 1877, delivered of a bastard child, and that the said child is now living, and liable to become a charge on said county of Linn; and that the above named defendant, William Isaac Benton, is the father of said child, and has wholly failed and refused to provide for the same in any manner.

SARAH TIMMONS.

Subscribed and sworn to, etc.

The notice to be issued by the clerk may be in the following manner:

STATE OF IOWA. }
LINN COUNTY. } ss.

To William Isaac Benton:

You are hereby notified that a complaint in the name of the State of Iowa, on the complaint of one Sarah Timmons, has been filed in the office of the clerk of the District Court of Linn county, Iowa, charging that said Sarah Timmons was, on the . . . day of . . . , 1877, delivered of a bastard child, and that you are the father thereof. And unless you appear and answer said complaint at the next term of said District Court, to be begun and holden at the court house in Marion, Linn county, Iowa, commencing on the . . . day of . . . , 187 . . . , default will be entered against you and a judgment for the maintenance of said child, as provided by law.

J. L. CRAWFORD,

Clerk District Court.

BASTARDY IS A CIVIL PROCEEDING.

A proceeding against the father for the support of his illegitimate child is not in the nature of a criminal action. *Holmes v. State*, 2 G. Greene, 501; *State v. Pratt*, 40 Iowa,

631. In Massachusetts and Vermont, the prosecution is held to partake of the nature of both civil and criminal. *Hill v. Wells*, 6 Pick., 104; *Rubie v. McNiece*, 7 Pick., 419. In Pennsylvania, the prosecution is by indictment. *Com. v. Pintard*, 1 Browne, 59. But in many of the states with statutes similar to our own, where the defendant is arrested, pleads not guilty, is bound to court, and can be committed to jail on failing to comply with the orders of court, a suit in bastardy has been held to be a civil suit. *Harman v. Taylor*, 2 Conn., 357; *Schaler v. Com.*, 6 Litt., 89; *Maston v. Jennings*, 1 N. C., 156; *Monroe v. Dyer*, 2 Greenl., 165; *Seinland v. The Com.*, 6 J. T. Marshall, 585; *Walker v. State*, 6 Blackf., 1. The court in the N. H. case say: "It is evident, we think, from these considerations, that the object of the statute is not to impose a punishment for an offense, but to redress a civil injury. For the purpose of affording this redress, the legislature, as they may in all cases of civil injury, have deemed it expedient to authorize the employment of process usually applicable to criminal proceedings alone. But the process is merely the form by which the redress is sought. The purpose to be obtained is an indemnity. As soon as this indemnity is furnished, the object of the law is satisfied without fixing any stigma upon the character of the respondent, as in a criminal conviction; and in other states it is regarded as a civil remedy. Complaints under the act are substantially civil suits, although some of their forms are adopted from the Criminal Code." To the same effect: "A bastardy proceeding is a *quasi* criminal proceeding." *State v. Mushied*, 12 Wis., 561; *State v. Jager*, 19 Wis., 235. So, to instruct the jury that the proceeding is not criminal, is proper. *State v. Pratt*, 40 Iowa, 631.

IN THE NAME OF THE STATE—TITLE OF ACTION.

A complaint in bastardy should be brought and commenced in the name of the state on the complaint of *A v. B.* *United States v. Shintaffer*, Morris, Iowa, 420; *State Ex. Rel. Woodkirk v. Williams*, 1 Blackf., 110.

JURISDICTION AS TO STATES—LOCAL REGULATION.

Proceedings in bastardy are merely local police regulations, and cannot be enforced beyond the jurisdiction of the state by which they are enacted; that is, if the act was committed in

Indiana, and the defendant removes to Iowa, the prosecuting party cannot follow and sue in Iowa, but is confined to the Indiana courts; but where the local jurisdiction has attached, and the courts of the state have taken recognizance and rendered judgment for the penalty prescribed by such statute, such judgment is entitled to full faith and credit in every other state. *State of Indiana, ex. rel. Mary A. Stone, v. Helmer*, 21 Iowa, 370.

This last case was commenced in Indiana, and service had on the defendant in that state, and judgment rendered in pursuance with the laws of that state, and afterwards an action was brought on a foreign judgment against the defendant in this state.

JURISDICTION—DISTRICT, CIRCUIT, AND COUNTY COURTS.

Under existing laws as above set out, the District Court alone, has jurisdiction of bastardy cases; but under the Revision of 1860, which enacted that such proceedings must be brought in the County Court, and under the laws of 1868, abolishing County Courts and establishing Circuit Courts, it was *held*, that the District Court had not original jurisdiction in these proceedings, but belongs to the Circuit Court. *State v. Cook*, 31 Iowa, 519; *Montgomery County v. Gorman*, 34 Iowa, 442.

COMPLAINT.

In a proceeding to compel the support of a bastard child by its father, no complaint, distinct from the "accusation" of the mother in writing, under oath, is required. *Cross v. People*, 10 Mich., 25.

EVIDENCE—IMPEACHMENT—CONTRADICTION.

In a proceeding for bastardy, it is admissible to discredit the testimony of the mother, as complaining witness, by disproving what she swore to on the preliminary examination. *Holmes v. State*, 1 G. Greene, 150.

EVIDENCE OF LEWDNESS.

Where the lewdness of plaintiff was sufficiently established by admitted evidence, there was no error in the rejection of other evidence tending to the same result. *State v. Pratt*, 40 Iowa, 631.

DECLARATIONS.

The complainant cannot be allowed to introduce in evidence the declaration of the attending physician, made to her during her travail, as to her condition and peril, for the purpose of corroborating her testimony, or to call witnesses to testify to a resemblance between the features of the child and the defendant. *Eddy v. Gray*, 2 Am., Law Register, 253.

CHASTITY OF COMPLAINANT.

Evidence that the complainant was in the habit of associating with young men whose reputation for chastity was bad, is inadmissible. *Eddy v. Gray*, 2 Am., Law Register, 253.

A defendant was charged with being the father of an illegitimate child, but it was shown on trial that, before and after the child was conceived, the mother was accustomed to occupy the same bed with a person who might have been the father of the child. Evidence of such fact is admissible, as tending to affect the credibility of her testimony. *State v. Read*, 45 Iowa, 469.

The defendant cannot be permitted to ask the mother whether she has not since the child's birth, been an inmate of a brothel, or whether she had sexual intercourse with any person besides the accused. *Duffies v. State*, 7 Wis., 672.

The mother may be questioned as to her having had sexual intercourse with other men besides the accused, at or about the time of the alleged conception. *Duffies v. State*, 7 Wis., 672; *Walker v. State*, 7 Ind., 646.

CHARACTER OF DEFENDANT.

The defendant, in a bastardy case in a civil suit, cannot introduce evidence of his general good character, and such a suit is decided upon a preponderance of evidence. *Walk v. State*, 6 Blackf., 1; *Mulhollin v. State*, 7 Ind., 646.

SETTLEMENT BY COMPLAINANT.

The mother of an illegitimate child may, by a fair settlement, founded upon a reasonable consideration with the putative father, preclude herself and the county from the right to maintain a proceeding under the provision of the statute relating to bastardy to secure to her the maintenance of the

child. But whether she can, by such settlement, preclude the county from the right to resort to this kind of a proceeding to compel the putative father to execute a bond, with surety, to indemnify the county, and all counties, for any expenses which might hereafter be incurred by them for the support of the child in case it should become a public charge, *quære?* *Black Hawk County v. Cotter*, 32 Iowa, 125.

INFANT MAY COMPROMISE.

An infant as well as an adult, may bind himself by a compromise, under the statute, with the mother, where she has commenced or threatened to commence a bastardy proceeding against him. *Gavin v. Burton*, 8 Ind., 69.

THE RIGHT TO PROSECUTE SURVIVES.

The right to prosecute survives against the personal representatives of the deceased putative father. *State v. Williams*, 8 Ind., 191.

INSTRUCTIONS—CHASTITY OF COMPLAINANT.

To instruct: "If the jury find that at or about the time the child was begotten, the woman had intercourse with other men, such fact should be considered by them, and given such weight as in their judgment it was entitled to receive; and that, notwithstanding such evidence, the jury may, upon the whole evidence, find the defendant guilty, if they are brought to believe thereby that he is the father of the child." The court held that these instructions were not erroneous, though the jury may find that the complainant has had connection with other men. This may tend to render the conclusion of defendant's guilt less certain, and cast a doubt upon the paternity of the child. But other facts would be competent to satisfy the jury that, notwithstanding the doubt raised by the woman's connection with other men, the defendant is the father of the child. *State v. Pratt*, 40 Iowa, 631.

OBJECT OF THIS PROCEEDING—INSTRUCTIONS.

An instruction to the jury that the objects, or one of them, was to protect the county from the expense of keeping an illegitimate child, is not erroneous. *State v. Pratt*, 40 Iowa, on page 634.

IMPOUNDING ANIMALS WITHOUT FOOD OR WATER. 143

BOND IN FAVOR OF COUNTY.

It is proper to take a bond from the father of the child, namely, a bond to keep the county, and every county in the state, harmless from the keeping and maintaining an illegitimate child. *Coburn v. Mahaska Co.*, 4 G. Greene, 242; *Owen v. State*, 12 Wis., 561.

JUDGMENT—CONDITIONS.

In a bastardy proceeding, upon filing the complaint and issuing of the writ, the court acquires jurisdiction of the property of the defendant, and a judgment requiring the payment of a certain sum annually for a number of years named, and directing that in default of the payment of any of said installments execution should issue, was held irregular so far as it directed execution to be issued upon the deferred payments. *Mills County, v. Hamaker*, 11 Iowa, 206.

IMPRISONMENT.

A bastardy proceeding not being a criminal action the defendant is exempt from imprisonment. *Holmes v. State*, 2 G. Greene, 501.

IMPOUNDING ANIMALS WITHOUT FOOD OR WATER.

SECTION 4034. If any person impound or confine, or cause to be impounded or confined in any pound or other place, any creature, and fail to supply the same during such confinement with a sufficient quantity of food and water, he shall be deemed guilty of a misdemeanor. [Limitation by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA, } District Court of the County of . . . , . . . term, 1878.
vs. }
. } Indictment.

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of impounding animals without food, committed as follows: That A. B. on etc., at etc., then and there being the marshal of said town, did take up, impound and confine one black and white cow of the property of one C. D., and so kept impounded and confined the said cow for the space of three days, to-wit: from the . . . day of . . . aforesaid, to the . . . day of . . . , and during the whole of said time did willfully and unlawfully neglect to supply her, the said cow, with a sufficient quantity of food and water, contrary to and in violation of law.

IMPORTING DISEASED AND TEXAN CATTLE, AND
DISEASED HOP ROOTS AND CUTTINGS.

SECTION 4055. If the owner of sheep, or any person having the same in charge, knowingly import or drive into this state sheep having any contagious disease; or turn out or suffer any sheep having any contagious disease, knowing the same to be so diseased, to run at large upon any common, highway, or unenclosed lands; or sell or dispose of any sheep, knowing the same to be so diseased, he shall be deemed guilty of a misdemeanor, and shall be punished by fine in any sum not less than fifty dollars nor more than one hundred dollars.

SEC. 4056. If any person knowingly import or bring within this state, any horse, mule, or ass, affected by the diseases known as nasal gleet, glanders, or button-farcey, or suffer the same to run at large upon any common, highway, or unenclosed land, or use or tie the same in any public place, or off his own premises, or sell, trade, or offer for sale or trade any such horse, mule, or ass, knowing the same to be so diseased, he shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine of not less than fifty dollars nor more than five hundred dollars; and in default of payment shall be imprisoned for any period not to exceed twelve months, or by both fine and imprisonment at the discretion of the court.

SEC. 4057. If any horse, mule, or ass, reasonably be supposed to be diseased with nasal gleet, glanders, or button-farcey, be found running at large without any known owner, it shall be lawful for the finder thereof to take such horse, mule, or ass, so found, before some justice of the peace, who shall forthwith cause the same to be examined by some veterinary surgeon, or other person skilled in such diseases, and if, on examination, it is ascertained to be so diseased, it shall be lawful for such justice of the peace to order such diseased animal to be immediately destroyed and buried; and the necessary expense accruing under the provisions of this section shall be defrayed out of the county treasury.

SEC. 4058. If any person bring into this state any Texas cattle, he shall be fined not exceeding one thousand dollars or imprisoned in the county jail not exceeding thirty days, unless they have been wintered at least one winter north of the southern boundary of the state of Missouri or Kansas; *provided*, that nothing herein contained shall be construed to prevent or make unlawful the transportation of such cattle through this state on railways, or to prohibit the driving through any part of this state, or having in possession any Texas cattle between the first day of November and the first day of April following.

SEC. 4059. If any person now or hereafter has in his possession in this state any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large, and thereby spreading the disease among other cattle known as the Texas fever, and shall be punished as is prescribed in the preceding section.

SEC. 4060. If any person use, transplant, or cultivate, or bring into this state for the purpose of using, planting, cultivating, or selling, any hop roots, plants, or cuttings, which may be diseased in any manner, or infected with lice or vermin of any kind, or which may be brought from any state or country in which the cultivation of hops has been retarded or impaired by the presence of any disease, lice or vermin of a contagious character, he shall be fined not less than ten nor more than one hundred dollars, and imprisoned not less five nor more than twenty days.

SEC. 4061. If complaint is made before a justice of the peace by any one or more responsible persons, that they have good reason to believe that hop roots have been introduced into, or are being cultivated in the city or township where they reside in violation of this act, the justice before whom such complaint is made shall issue a warrant authorizing any peace officer to seize such roots, and they shall be held in charge by such officer until suit has been brought against the person or persons so offending, and the cause determined; and in case it is found that the said plants, roots, or cuttings are diseased, or are infected by lice or vermin of a contagious character, the officer before whom suit is brought will order the said roots, plants, or cuttings to be burned, charging the expense of doing the same as costs upon the party owning or cultivating the roots, plants, or cuttings; and in no case will he allow them to be planted or delivered to a third party, until the fact is established that they are not infected with any vermin or disease of a contagious character. [Limitation, by section 4168, is one year, applying to sections 4055, and 4060, and, by section 4167, three years, applying to sections 4056, and 4058.]

Form of Information under Section 4055.

THE STATE OF IOWA, } Before . . . , a Justice of . . . County.
vs. }
..... } *Information.*

The defendant is accused of the crime of importing diseased sheep into this State: For that the said . . . on or about the . . day of . . . , 187 . . , the said defendant, then and there being the owner of a certain number of sheep, to-wit: five hundred head, did, knowingly and willfully, bring into the County of Linn, and State of Iowa, from another State, to-wit: the State of Illinois, the said five hundred head of sheep, the same being infected with a contagious disease, to-wit: the foot rot, the said O B

well knowing the said sheep at the time to be infected with said disease contrary to, and in violation of law.

Under Section 4056 use the same form.

Under Section 4058, "Bringing Texas Cattle into the State," the following form of indictment will apply: The said defendant did, unlawfully, bring into this State, to-wit: the State of Iowa, from another State, to-wit: the State of Missouri, one thousand head of cattle, known as, and called, "Texas cattle," contrary to, and in violation of, law.

And, for having in possession Texas cattle, the defendant is liable in a civil, as well as a criminal action, and punishable for the criminal act as provided in Section 4058 above.

Under Section 4060 an information similar to the above indictments is sufficient.

INCEST.

SECTION 4030. If any man marry his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter or sister's daughter; or if any woman marry her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son or sister's son; or if any person being within the degrees of consanguinity or affinity in which marriages are prohibited by this section, carnally know each other, they shall be deemed guilty of incest, and shall be punished by imprisonment in the State penitentiary for a term not exceeding ten years and not less than one year. [Limitation, Sec. 4167, three years.]

Form of Indictment.

THE STATE OF IOWA	}	District Court of the County of term, 1878.
VS.		Incest.
.		Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of incest, committed as follows: That the said . . . , in the county of . . . , and State of Iowa, on or about the . . . day of . . . , 1878, then and there being did willfully, unlawfully, and feloniously marry one . . . , each being then and there within the degree of consanguinity within which marriages are prohibited, to-wit: brother and sister, contrary, etc. Or did commit the crime of incest, said . . . being the father of one . . . and being within the degrees of consanguinity, did, on said day, at the county and State aforesaid, carnally know each other, the said . . . and . . . then and there standing in relation to each other of father and daughter, contrary to and in violation of law.

INDICTMENT—RELATION—KNOWINGLY.

It is not necessary to allege in an indictment for incest that the defendant had carnal knowledge with the prosecutrix,

knowing her to be his daughter, where the statutes do not contain that language. The Missouri statute is like that of Iowa. 2 Bishop Cr. Prac., Sec. 31; *State v. Bullinger*, 54 Mo., 142; *Baker v. State*, 30 Ala., 521; *Bergen v. People*, 17 Ill., 426; *Hicks v. People*, 10 Mich., 395; 2 Green's Cr. R. 601.

ALLEGATION OF RELATIONSHIP.

Under the statute of Indiana against incest between step-son and step-mother, each must have knowledge of the relationship, and an indictment against the step-son which does not allege that the step-mother knew of the relationship is bad on a motion to quash. *Baumer v. State*, 49 Ind., 544; 1 Am. Cr. R., 354; 19 Am. R., 691.

In Ohio, the relation of step-father and step-daughter, within the meaning of the statutes against incest, terminates with the death or divorce of the mother. To aver this relation, therefore, it is necessary to aver the marriage of the mother to the step-father, and the existence of it at the time of committing the offense. *Noble v. State*, 22 Ohio St., 541; 1 Green's Cr. R., 662.

TIME AND DATE.

The indictment must allege a single offense, and name the day on which it was committed. Where the crime was charged to have been committed on the 20th of September, 1860, "and on divers other days and times between that day and the 9th day of December, 1862," thus alleging a series of offenses without specifying any particular day, except the first, the indictment was held bad. *State v. Temple*, 38 Vt., 37.

DEGREES OF CONSANGUINITY.

To allege that H, then and there the daughter of defendant, is sufficient without also averring "within the degrees of consanguinity." *Hicks v. People*, 10 Mich., 395.

ELEMENTS.

It is the intermarriage of persons within the degrees of consanguinity that constitutes the crime of incest, as defined by Sec. 4369, Rev. 1860, and Sec. 4030, Code of 1873. *State v. Schaunhurst*, 34 Iowa, 547.

CARNAL KNOWLEDGE.

In Iowa, the intermarriage of persons within the prohibited degrees of consanguinity constitutes incest without proof of carnal knowledge. *State v. Schaunhurst*, 34 Iowa, 547.

BROTHER AND SISTER.

The terms brother and sister in the statute mean offspring of the same parents, and do not necessarily imply legitimacy of birth. *Ib.*

STEP-DAUGHTER.

In Mississippi, it is not incest for a man to cohabit with his step-daughter. *Chancellor v State*, 47 Miss., 278. The offense may be committed with a natural as well as with a legitimate daughter. *Morgan v. State*, 11 Ala., 289.

EMISSION.

Emission is an essential ingredient in the crime of incest. *Noble v. State*, 22 Ohio St., 542.

CONSANGUINITY.

The relation of step-father and step-daughter, within the meaning of the law, does not exist after the termination of the marriage relation between the step-father and the step-daughter's mother. *Noble v. State*, 22 Ohio St., 541.

EVIDENCE—MARRIAGE—ANCESTORS.

In a prosecution against two persons, they being brother and sister, it is not necessary for the State to show that their parents were lawfully married. *State v. Schaunhurst*, 34 Iowa, 547; *People v. Jenness*, 5 Mich., 305.

IDENTITY.

The identity of the defendants may be established by their admissions, and their relationship also by their acts and declarations. *State v. Schaunhurst*, 34 Iowa, 547; *State v. Bullinger*, 54 Mo., 142; *Ewell v. State*, 6 Yerg., 364; 2 Green's Cr. R., 601; 5 Mich., 318.

ADMISSIONS—DECLARATIONS—GENERALLY.

Admissions by the defendants as to the relation existing is admissible. So evidence of previous or continuous acts of intercourse, not as original evidence, but to show that the

crimes alleged, or statements made, are true. *People v. Jenness*, 5 Mich., 320; *People v. Harriden*, 1 Park. Cr. R., 344; *Morgan v. State*, 11 Ala., 289. While it is also held that knowledge of both parties must be shown. *Banner v. State*, 49 Ind., 544; 19 Am. R., 691. So the relation of brother and sister may be shown by their admissions. *Schaunhurst v. State*, 34 Iowa, 547. But where the indictment charges the defendant with having committed incest on a certain day, which is proved, the prosecution cannot show that the defendant had sexual intercourse with the prosecutrix at a subsequent time. *Lovell v. State*, 12 Ind., 18.

BAR, ACQUITTAL.

Incest is a joint offense, and if one of the parties has been tried and acquitted, this fact, if pleaded, is a bar to the prosecution of the other party for the same offense. *Baumer v. State*, 49 Ind., 544; 1 Am. Cr. R., 354.

SENTENCE—PUNISHMENT.

Imprisonment for ten years for incest with a step-daughter was held to be too high, and was reduced to five years. *State v. Thompson*, 46 Iowa, 699.

INJURING TREES, BREAKING FENCES, ETC.

SECTION 3981. If any person maliciously cut down, injure, or destroy any fruit or ornamental trees, or other tree, vine, or shrub of another, standing or growing for ornament or use; or maliciously break down, mar, deface, or injure any fence, hedge, or ditch enclosing lands belonging to another; or throw down or open any gate or bars not his own or under his charge and leave them open, whereby an injury is done to another; or maliciously injure, destroy, or sever from the land of another any produce thereof or anything attached thereto, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding one hundred dollars, or by both imprisonment and fine at the discretion of the court. [Limitation, by section 4167, three years.]

The same form of indictment may be used for this section as will be found under section 3897, *ante*. Title, "Injuries to Fruit Trees and Picking Fruit."

INJURING FRUIT TREES AND PICKING FRUIT.

SEC. 3897. If any person maliciously or mischievously enter the enclosure of another, with intent to knock off, pick, destroy, or carry away; or, having lawfully entered, do afterwards wrongfully knock off, pick, destroy, or carry away any apples, peaches, pears, plums, grapes, or any other fruit or flower of any tree, shrub, bush or vine, he shall be punished, for the first offense, by a fine not less than five dollars nor exceeding one hundred dollars, with the costs of conviction, or by imprisonment in the county jail not exceeding thirty days; and should any person be found guilty of a second violation hereof, he shall be fined not less than ten dollars and costs of conviction, or imprisonment as above provided.

SEC. 3898. If any person maliciously or mischievously enter the enclosure of another in the night time, and knock off, pick, destroy, or carry away any apples, peaches, pears, plums, grapes, or other fruit or flower of any tree, shrub, bush or vine; or, if any person, having entered the enclosure of another in the night time, with the intent to knock off, pick, destroy, or carry away any fruit or flower as aforesaid, be actually found therein, he shall, on conviction thereof, be punished by a fine not less than twenty-five nor to exceed one hundred dollars, and costs of conviction, or by imprisonment in the county jail not exceeding thirty days.

SEC. 3899. If any person maliciously or mischievously bruise, break, pull up, cut down, carry away, destroy, or in anywise injure any fruit or ornamental tree, shrub or vine, growing or standing on the land of another, he shall be punished by a fine not less than ten nor exceeding one hundred dollars and costs of conviction, or by imprisonment in the county jail not exceeding thirty days. [Limitation, by section 4168, one year.]

Form of Information.

THE STATE OF IOWA } Before . . . a justice of . . . county.
vs. }
. } *Information.*

The defendant is accused of the crime of entering the enclosure of another and picking fruit without the permission of the owner: For that the said . . . , on the . . . day of . . . , 187 . . . , in the township of . . . , county of . . . , and State of Iowa, did willfully, maliciously and unlawfully enter the enclosure and orchard of C D, in said township and county aforesaid, without the permission of said C D, the owner thereof, so to do, and did then and there pick, pull off and carry away a portion of the fruit on the trees of said orchard growing, to-wit: one-half a bushel of apples, of the value of fifty cents, contrary to and in violation of law.

Or, same in night time, under section 3898, by adding to the above form the words, "in the night time."

Or, under section 3899, add, "did maliciously girdle a certain apple tree, then and there growing and standing in the said orchard," etc.

INJURING MONUMENTS, TOMBSTONES, ETC.

SEC. 4021. If any person willfully destroy or injure any tomb, gravestone, monument, or other thing placed or designated as a memorial of the dead; or any fence, railing, or other thing placed about the same; or any place enclosed for the burial of the dead; or willfully destroy, injure or remove any tree, shrub, or plant within such enclosure, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both fine and imprisonment. [Limitation, by section 4167, three years.]

See, also, title "Cemeteries, and Protection Thereof."

Form of Indictment.

THE STATE OF IOWA } District Court of the County of term, 1878.
vs. }
. } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of injuring a monument, committed as follows: That A B, on the . . . day of . . . , 187. . , at . . . , in the county and state aforesaid, the cemetery of and belonging to the city of . . . aforesaid, in the county aforesaid there situate, feloniously, unlawfully, willfully and indecently did break open and enter a tomb therein, in which a certain human body, to-wit: the body of one C D, had lately before been interred, and then was, contrary, etc.

Or, for injuring tombstones.

. . . did unlawfully and willfully disfigure and injure a certain tombstone, set up and being at the grave of one G H, deceased, within the cemetery known as the "Marion Cemetery," in said county and state, by then and there so willfully breaking off the top part of said tombstone, contrary to and in violation of law.

INJURY TO CAPITOL SQUARE.

AN ACT to protect the State property known as Capitol Square and Governor's Square, in Des Moines, Iowa.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That any company or companies, person or persons, whether acting as officers or employes of said company or companies, who shall mine, or cause to be mined, any coal, or who shall run any drift or lead under the property of the state known as capitol square and governor's square, shall, upon conviction thereof, be subject to a fine of not less than five hundred dollars or more than one thousand dollars, and imprisonment not less than ninety days or more than two years.

SEC. 2. This act, being deemed of immediate importance, shall take effect from and after its publication in the Iowa State Register and Iowa State Leader, newspapers published in Des Moines, Iowa.

Approved, March 26, 1878.

I hereby certify that the foregoing act was published in the Iowa State Leader, April 2, and in the Iowa State Register, April 4, 1878.

JOSIAH T. YOUNG, Secretary of State.

INOCULATING WITH SMALL-POX WITH INTENT TO SPREAD DISEASE.

SEC. 4039. If any person inoculate himself or any other person, or suffer himself to be inoculated with the small-pox within this state, or come within the state with the intent to cause the prevalence or spread of this infectious disease, he shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA, } vs. } }	District Court of the County of term, 1878 <i>Indictment.</i>
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The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of inoculating with small-pox with intent to spread the disease, committed as follows: That the said . . . , on the . . . day of . . . , 187 . . . , in the county of . . . and State of Iowa, did cause and procure himself to be inoculated with small-pox, within this state, with the intent then and there unlawfully to cause the spread of small-pox, the same being an infectious disease, which the said defendant did, knowingly, and contrary to and in violation of law.

INSURANCE COMPANIES.

SEC. 1147. Every insurance company organized under the laws of, or doing business in, this state, shall conform to all the provisions of this chapter applicable thereto, and, when necessary, any existing company shall change its charter and by-laws so as to conform hereto, by a vote of a majority of its board of directors; and any president, secretary, or other officer of any company organized under the laws of Iowa, or any officer or person doing, or attempting to do, business in this state for any insurance company organized without this state, failing to comply with any of the requirements of this chapter, or violating any of the provisions thereof, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not exceeding one thousand dollars, and be imprisoned in the county jail for a period not less than thirty days nor more than six months.

LIFE INSURANCE COMPANIES.

SEC. 1178. The penalties provided for in this chapter shall be sued for and recovered in the name of the State of Iowa, by the district attorney in the district or circuit court of the county in which the company or agent violating shall be situated or reside. Three fourths of said penalty, when recovered, shall be paid into the county treasury for the use of

the school fund, and one-fourth to the informer of such violation. In case of non-payment of the penalty, the individual offending shall be liable to imprisonment in the county jail for a period not exceeding three months.

KEEPING A GAMBLING HOUSE—GAMING AND BETTING.

SECTION 4026. If any person keep a house, shop, or place resorted to for the purpose of gambling; or permit or suffer any person in any house, shop, or other place under his control or care to play at cards, dice, faro, roulette, equality, or other game, for money or other thing, such offender shall be fined in a sum not less than fifty dollars nor more than three hundred dollars, or be imprisoned in the county jail not exceeding one year, or be both fined and imprisoned. In a prosecution under this section, any person who has the charge of or attends to any such house, shop, or place, may be deemed the keeper thereof.

SEC. 4027. If any person make oath before a justice of the peace that he has probable cause to suspect and does suspect that any house, building, or place, naming the house or place and the occupant, is unlawfully used as a common gaming house or place for the purpose of gaming for money or other property, and that persons resort to the same for that purpose, whether they be known to the complainant or not, such justice may issue his warrant for the purpose of searching such house or building for all such implements or gambling devices mentioned in the preceding section, and for the apprehension of the occupant or keeper of said house or building; and after such search, seizure, and arrest, the said implements and keeper shall be carried before such justice of the peace, to be dealt with as provided by law. And any gambling device brought before the justice may be destroyed by him, and an entry thereof shall be made upon his docket.

SEC. 4028. If any person play at any game for any sum of money or other property of any value, or make any bet or wager for money or other property of value, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

SEC. 4029. All promises, agreements, notes, bills, bonds or other contracts, mortgages, or other securities, when the whole or any part of the consideration thereof is for money or other valuable thing won or lost, laid, staked or bet, at or upon any game of any kind, or on any wager, are absolutely void and of no effect. [Limitation by Sec. 4167, three years. Section 4026 and section 4028 come within the provisions of section 4168, limitation one year.]

Form of Indictment.

THE STATE OF IOWA, } In District Court of . . . County, . . . term, 1878.
 vs. }
 } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of a nuisance committed as follows: That the said . . . , in the county of . . . , and State of Iowa, did, on the . . . day of . . . , 187 . . . , and on divers other days and times, between that day and the finding of this indictment, keep a place, commonly called a saloon, resorted to for the purpose of gambling; and then and there did permit and suffer divers persons, to the grand jurors unknown, in said place, the same being under his control, to play at cards and other games, to these grand jurors unknown, for money and other property, contrary to, and in violation of, law.

The above form is substantially approved in *State v. Cure*, 7 Iowa, 479; *State v. Cooster*, 10 Iowa, 453; *State v. Middleton*, 11 Iowa, 247; *State v. Bitting*, 13 Iowa, 600; *State v. Bishel*, 39 Iowa, 42; *State v. Book*, 41 Iowa, 550.

The Information may be in the following form:

THE STATE OF IOWA, } Before . . . , a Justice of . . . County.
 vs. }
 } *Information.*

The defendant is accused of the crime of betting for money, for that the said . . . , in the town of . . . , township of Marion, Linn County, Iowa, did, unlawfully, bet a sum of money, to-wit: five dollars upon a certain game, commonly called "poker," then and there being played by means of certain gambling devices, to-wit: cards, contrary to, and in violation of, law.

INDICTMENT.

It is not necessary to aver the names of the parties who played, nor what kind nor how much money or property was played for. *Romp v. State*, 3 G. Greene, 278.

DUPLICITY.

To charge, in one count, the defendant with keeping a gambling house, and in the second, with permitting other persons in a place under his control to play at cards or other games for money, is not bad for duplicity. *State v. Cooster*, 10 Ib., 453; *State v. Bitting*, 11 Ib., 600.

ALLEGATION OF OWNERSHIP.

The Supreme Court of Texas hold that the indictment need not charge, or the state prove that the store house was the property of . . . or that the store was occupied by . . . or that they were co-partners. *Prior v. State*, 4 Texas, 383; *Sublett v. State*, 9 Texas, 55; *Wilson v State*, 5 Texas, 22; *Sheppard v. State*, 1 Texas Court of Appeals, 304.

CONTROL OF HOUSE BY DEFENDANT.

To charge that the defendant was the keeper of a house resorted to for the purpose of gambling, and knowingly did

permit, etc., sufficiently charges that the same was under his control. *State v. Middleton*, 11 Iowa, 247.

ELEMENTS.

The character or name of a game cannot be evaded by calling it some unusual name, other than its right name. *State v. Maurer*, 7 Iowa, 407.

PLAYING FOR DRINKS.

Playing for drinks or other property is gambling within the meaning of the statute, or where the losing party pays for the drinks. *State v. Maurer*, 7 Iowa, 407; *State v. Cooster*, 10 Iowa, 454; *State v. Leight*, 17 Iowa, 29; *State v. Bischell*, 39 Iowa, 43.

DEFENDANT'S KNOWLEDGE.

Knowledge and consent of the defendant may be inferred by his customers playing and paying in his presence. *State v. Cooster*, 10 Iowa, 455.

An allegation that the defendant unlawfully permitted persons to play at cards, sufficiently avers knowledge on the part of the defendant that others played for money. *State v. Cure*, 7 Iowa, 479.

NUMBER OF ACTS.

In order to sustain a conviction, it is not necessary for the state to prove several distinct acts of gambling or violations of law. *State v. Cooster*, 10 Iowa, 456; *Hitchins v. People*, 39 N. Y., 454.

BILLIARDS AND PIN POOL PLAYING.

To play either billiards or pin pool is gambling, where the losing party pays for the game, and the owner of the table is guilty, under the statute, of keeping a house resorted to for the purpose of gambling. *State v. Book*, 41 Iowa, 550; *State v. Leighton*, 3 Foster, N. H., 167; *Ward v. State*, 17 Ohio State, 32; 20 Am. R., 609; *Bachelor v. State*, 10 Texas, 262; *State v. Kelley*, 24 Texas, 182; *Longworth v. State*, 41 Texas, 508; 1 Texas Court of Appeals, 365; 1 Am. Cr. R., 234. While a contrary doctrine is held in *Harbaugh v. People*, 40 Ill., 294; *Blewitt v. State*, 34 Miss., 606, under statutes of those states.

STRAP GAME.

Where the indictment charged "that the defendant did by means of a certain device and game performed with a strap, known as a strap game," obtain money from the prosecuting witness, it was held that the statute embraces any "sleight of hand" performance, whether performed by means of cards, or other device. *State v. Quinn*, Western Jurist, February Number, 1878, page 123.

LOCATION OF PREMISES.

It is not necessary to describe the location particularly any further than to allege that it was within the county; but if the place be described as a matter of local description, it must be proved as alleged. *State v. Crogan*, 8 Iowa, 523; *People v. Slater*, 5 Hill, 401; *People v. Honeyman*, 3 Denio, 121; *Shaw v. Wrigley*, 2 East, 500.

SEVERAL COUNTS—PROOF.

Where several counts are set out, the prosecution need not prove each, as it is sufficient to prove one. *State v. Cooster*, 10 Iowa, 454; 6 Metc., 241.

EXAMINATION OF WITNESSES.

It is proper to ask the witness what the general custom was about paying for the beer, cigars, etc. *State v. Bishell*, 39 Iowa, 44.

CHIPS AND CHECKS.

Chips and checks redeemable in money by the dealer at a gambling table are things of value, within the meaning of a statute against gaming. *Porter v. State*, 51 Ga., 300; 1 Am. Cr. R., 232.

BETTING UPON ELECTION.

The betting upon an election or the result thereof is not gaming; an election is not a game. *Woodcock v. State*, 11 Ind., 14; *McHatton v. Bates*, 4 Blackf., 63; *State v. Henderson*, 47 Ind., 127; 1 Am. Cr. R., 233.

DICE.

To throw dice, or play at any game of chance or skill is gambling. *Com. v. Gourdier*, 14 Gray, 390; *McDaniel v. Com.*, 6 Bush, Ky., 326.

HORSE RACING.

In Iowa horse racing is not a game of chance within the meaning of the gaming law. *Harless v. U. S.*, Morris, Iowa, 169.

KEEPING COCK-PITS AND FIGHTING ANIMALS.

SECTION 4033. If any person keep or use, or in any way be connected with, or be interested in the management of, or receive money for the admission of any person to any place kept or used for, the purpose of fighting or baiting any bull, bear, dog, cock, or other creature, or engage in, aid, abet, encourage, or assist in any bull, bear, dog, or cock fight, or a fight between any other creature, he shall be deemed guilty of a misdemeanor. [Limitation, by section 4168, three years.]

KEEPING FALSE BOOKS BY A CORPORATION.

SECTION 1075. The intentional keeping of false books or accounts by any corporation, whereby any one is injured is a misdemeanor on the part of those concerned therein, and any person shall be presumed to be concerned therein whose duty it was to see that the books and accounts were correctly kept. [Limitation, by section 4167, three years.]

KEEPING HOUSE OF ILL-FAME.

SECTION 4013. If any person keep a house of ill-fame, resorted to for the purpose of prostitution or lewdness, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars; and any person who, after having been once convicted of such offense, is again convicted of the like offense, shall be punished by imprisonment in the penitentiary not less than one year nor more than three years. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA } District Court of the county of term, 1878.
vs. }

. } Indictment.

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of keeping a house of ill-fame, committed as follows: That the said . . . in the county of . . . and State of Iowa, on the . . . day of . . . 1878, and on other days and times within the past three years, and up to the time of the finding of this indictment in the county and State aforesaid, did unlawfully and willfully keep a house of ill-fame, resorted to by divers persons, whose names are to the grand jurors unknown, for the purpose of prostitution and lewdness, contrary to and in violation of law.

This form is approved in *State v. Shaw*, 35 Iowa, 576; *State v. Chartrand*, 38 Iowa, 691.

INDICTMENT—INFORMATION.

An information for letting a house for the purpose of prostitution need only follow the usual practice in the description of the locality. *Saunders v. People*, 29 Mich., 269; 1 Am. Cr. R., 346.

EVIDENCE—CHARACTER OF DEFENDANT.

Evidence as to the bad character of the defendant is inadmissible where the charge is against the defendant and not the house. *State v. Hand*, 7 Iowa, 411; *State v. Donneker*, 40 Iowa, 340.

KEEPER OF HOUSE—PROOF.

It is not necessary for the State to prove that the defendant was the owner of the house; nor by positive evidence that he was the keeper of it; but that he acted as such, or so held himself out to the world. *State v. Hand*, 7 Iowa, 412.

CHARACTER OF HOUSE.

The character of the house may be shown by the common reputation in the neighborhood in which it is located. *State v. Donneker*, 40 Iowa, 340; *O'Brien v. People*, 28 Mich., 213; 2 Green's Cr. R., 571. Evidence of the general reputation of a house for the purpose of establishing its character as a house of prostitution is admissible. *Morris v. State*, 38 Texas, 603; *State v. McDowell*, Dudley, S. C., 346; *State v. Hand*, 7 Iowa, 412; *Sylvester v. State*, 1 Am. Cr. R., 350.

CHARACTER OF INMATES.

It is proper to show that females as inmates of the house were arrested and fined as prostitutes; and also that the defendant went their bail. *Hardwood v. People*, 26 N. Y., 190. Common reputation of the character of the defendants and the house which they kept, and of the persons visiting them, is admissible. 3 Whart. Cr. Law, Sec. 2393; 1 Am. Cr. R., 350. It is believed to be well settled that the character of the occupants may be established by evidence of their general reputation (2 Bishop Cr. Pr., Sec. 93; 1 Am. Cr. R., 350), while the admissibility of such evidence as to the house is denied by some authorities. *Commonwealth v. Stewart*, 1 Serg. & Rawle, 342.

LANDLORD AND TENANT.

Where it appeared that the owner of a house leased it and knew it was kept as a house of ill-fame, and also lived there a part of the time himself, these facts would not render him liable to an indictment for keeping a house of ill-fame. To render him liable of the offense he must either have participated in, or been authorized to participate in its management. *State v. Pearsall*, 43 Iowa, 630. The following is an opinion in full by the Supreme Court of Maine, per DICKERSON, J.: "The defendant is indicted for keeping a house of ill-fame, resorted to for the purpose of prostitution and lewdness. The offense charged is that of a common nuisance. The language of the statute is as follows: 'All places used as houses of ill-fame, resorted to for lewdness or gambling, for the illegal sale or keeping of intoxicating liquors, are common nuisances.' R. S., Ch. 77, Sec. 1. The terms, 'house of ill-fame' and 'bawdy house,' are synonymous. 'A bawdy house,' says Bouvier, 'is a house of ill-fame, kept for the resort and unlawful convenience of lewd people of both sexes. 1 Bouvier's Law Dic., H. B., 2; Archbold's Crim. Prac. & Plead., 1667; Bishop Cr. Law, 5th ed.; *McAllister v. Clarke*, 33 Conn., 92. The common signification of the word corresponds with its technical meaning. 'A bawdy house,' says Worcester, 'is a house used for lewdness and prostitution—a brothel.' The idea conveyed by the term 'house of ill-fame,' or its synonym, 'bawdy house,' is that of a house 'resorted to for the purposes of lewdness and prostitution;' a house used as a house of ill-fame is a house thus resorted to; it cannot be used unless it is thus resorted to, and if it is resorted to for such purpose, it is a house used as a 'house of ill-fame' in the purview of the statute, though it may not have that reputation. The phrase, 'resorted to for lewdness,' contained in the statute, does not qualify, enlarge or change the meaning of the preceding clause in this case; the statute in this case has the same meaning and application without as with that phrase. In order to make out the offense charged in the indictment, under our statute, it is necessary to establish two things: *first*, that the house was used as a house of ill-fame; and *second*, that the defendant kept it. The gist of the offense consists in the use, not in

the reputation of the house. Its reputation for lewdness and prostitution may be ever so clearly established, and yet if the evidence does not show that it was in truth used for those purposes, the first element in the offense is not proved; but if that is made, it is immaterial what the reputation of the house was, or whether it had any. The reputation of a house, under our statute, makes no part of the issue. Testimony as to its reputation has no tendency to establish the issue that it was in fact used as a house of ill-fame, and is inadmissible as a mere hearsay evidence. On trial of an indictment for a nuisance, it is not admissible to show that the general reputation of the subject of the nuisance charged was that of a nuisance. 2 Whart. Cr. Law, Sec. 2367; 3 Greenl. Ev., 6th ed., 186; 2 Bishop's Cr. Pro., Sec. 91. The judge in the court below erred in admitting such evidence.

"We are aware that the court in Connecticut, in *Caldwell v. State*, 17 Conn., 467, held that to support such an information, under the statute of that State, it is necessary to prove that the general reputation of the house was that of a bawdy house, and that it was such in fact. To establish the first proposition, the court in that case admitted the evidence of the reputation of the house, but distinctly say that such testimony would be clearly inadmissible to prove that the house was in fact a house of ill-fame. We have seen that under the phraseology of our statute, it is not necessary to prove the reputation of the house, and the case of *Caldwell v. State*, 17 Conn., 467, thus becomes authority for excluding evidence of reputation in this case. 2 Bish. Cr. Pro., Sec. 91.

"Evidence of the reputation of the women frequenting the house, and the character of their conversation and acts in and about it, is competent in such cases, as the judge ruled. *Commonwealth v. Kimbal*, 7 Gray, 328; *Commonwealth v. Gannett*, 1 Allen, 8. The judge also properly overruled the defendants' plea. *Ware v. Ware*, 8 Me., 42; *State v. Boardman*, 64 Me., 523; 1 Am. Cr. R., 351."

KIDNAPPING.

SECTION 3869. If any person willfully and without lawful authority, forcibly or secretly confine or imprison any other

person within this state against his will; or forcibly carry or send such person out of the state; or forcibly seize and confine or inveigle or kidnap any other person with the intent either to cause such person to be secretly confined or imprisoned in this state against his will, or to cause such person to be sent out of this state against his will, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine and imprisonment at the discretion of the court. [Limitation by section 4167, three years.

Form of Indictment.

THE STATE OF IOWA, } In District Court of . . . county, . . . term, 1878.
vs. }
. } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of kidnapping, committed as follows: That the said . . . in the county of . . . and State of Iowa, on or about the . . . day of . . . 187 . . . did forcibly, willfully, and without lawful authority, seize and confine one O. S., in the county of Linn and State of Iowa, with intent, him the said O. S., then and there, unlawfully, and feloniously to send out of the State of Iowa to-wit: to the city of Chicago in the State of Illinois, and against the will of the said O. S., contrary to and in violation of law.

People v. Merrill and Russell, 2 Park. Crim. R., 590.

INDICTMENT—STATUTORY LANGUAGE.

If an indictment for kidnapping follow the language of the statute in describing the offense, it is sufficient. *State v. McRoberts* 4 Blackford, Ind., 178.

ELEMENTS CONSTITUTING KIDNAPPING.

Forcibly confining, inveigling or kidnapping a negro, with intent to send him out of the State, against his will, is an offense against the statute, whether he be a slave or not. *Thompson's Case*, 2 C. H., Rec., 120; *Pulford's Case*, 4 Ib., 172.

PROCURING THE INTOXICATION.

The procuring intoxication of a person with a design of getting him on board of a ship in that condition, without his consent, and thus taking him on board, is a kidnapping within the meaning of the law, as much so as if it had been done by force in overcoming his resistance when in full strength; and it is immaterial whether the prisoner did the acts in person or caused or advised their being done. *Hadden v. People*, 25 N. Y., 373.

SLAVES—KIDNAPPING A SLAVE.

See *People v. Merrell & Russell*, 2 Park, Cr. R., 590.

KILLING BIRDS.

SECTION 4063. If any person kill, trap, ensnare, or in any manner destroy any of the birds of this state, excepting birds of prey, the migratory aquatic birds, and those which are useful for food, and the killing of which at certain seasons of the year is now permitted by law; or in any manner destroy the eggs of such birds as are hereby intended to be protected from destruction, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than five nor more than twenty-five dollars. But persons killing birds for scientific purposes, or for preservation in museums and cabinets, shall be exempt from the penalties of this section, upon making satisfactory proof of the purposes for which they have killed any such bird or birds. [Limitation, by section 4168, one year.

KILLING GAME AT IMPROPER SEASONS, AND
LIABILITY OF RAILROADS FOR CARRYING
SAME.

SECTION 4048. If any person elsewhere than on his own premises and for his own exclusive use, kill, ensnare, or trap any wild deer, elk, fawn, prairie hen or chicken, between the first day of January and the twenty-second day of August in any year; or any woodcock between the first day of January and July in any year; or any ruffed grouse, or pheasant, between the fifteenth day of December and the twelfth day of September in any year; or any wild turkey between the first of February and the first of September in any year; or if any person elsewhere than on his own premises net, ensnare, or trap any of said animals or birds at any time of any year except in the month of December thereof; or if any person anywhere shoot, kill, net, ensnare, or trap any quail at any time of the year—except that it shall be lawful for any one to shoot quail upon any premises with the consent of the owner or occupant thereof—between the first day of October and the first day of January of each year; or if any person kill, ensnare, or trap any beaver, mink, otter, or muskrat, between the first day of April and the first day of November in each year; or if any person buy or sell any of the above animals or birds which have been trapped, ensnared, or killed between the days above mentioned, he shall be punished by a fine of fifteen dollars for each deer, fawn, or elk snared, entrapped, killed, bought, sold, or held in possession, and five dollars for any bird of game above mentioned thus killed, trapped ensnared, bought, sold or held in possession, one half of such fine to be

paid to the person upon whose information the same is recovered.

SEC. 4049. If any railway, express company, or other common carrier in this state, or any of their agents or servants, have any of the above birds or animals in their possession, for transportation or other purpose, during the periods above limited and prohibited, they shall be punished by fine of not less than one hundred dollars nor more than three hundred dollars, or by imprisonment in the county jail thirty days, or by both such fine and imprisonment.

SEC. 4050. If any person go upon the premises of any other person or corporation, whether enclosed or not, and be found hunting, trapping, or ensnaring any of the above named birds or animals, in violation of the foregoing provisions, he shall be punished by fine in any sum not less than three dollars nor more than fifty dollars.

SEC. 4051. A prosecution for violation of sections four thousand and forty-eight, and four thousand and forty-nine of this chapter may be brought either in the county in which the offense was committed, or in any other county where the person complained of has had, or has in his possession any animals or birds, killed, ensnared, trapped, bought or sold in violation of said sections; and the having in possession any of the animals or birds mentioned in said sections, recently killed by any person or persons between said dates, shall be deemed and taken as presumptive evidence that the same was trapped, ensnared, or killed, by the persons having the possession of the same in violation thereof.

Form of Information, under section 4048.

THE STATE OF IOWA, } Before . . . , a justice of . . . county, Iowa.
vs. }
..... } *Information.*

The defendant is accused of the crime of unlawfully killing game. For that the defendant in the township, of . . . county of . . . and State of Iowa, between the first day of February and the first day of September to-wit, on the 16th day of July, in the year 1876, *upon the premises of one C. D., unlawfully did, shoot and kill a certain wild turkey then and there being and running at large, contrary to, and in violation of law.

Or, under section 4049: That A B at, etc., then and there being engaged in the business of a common carrier, between, etc. [give dates as in last above], unlawfully did have in his possession for transportation a certain wild turkey, etc.

Or, under section 4050 (follow form under section 4048, to *, then add), upon the premises of one C D, unlawfully, etc.

**KILLING, MAIMING, OR DISFIGURING STOCK
MALICIOUSLY.**

SECTION 3977. If any person maliciously kill, maim, or disfigure any horses, cattle, or other domestic beasts of another; or maliciously administer poison to any such animals; or ex-

164 KILLING, MAIMING, OR DISFIGURING STOCK.

pose any poisonous substance with intent that the same should be taken by them, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding three hundred dollars. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA, | In District Court of . . . county, . . . term, 1878.
VS. |
. | *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of maiming stock, committed as follows: That the said . . . on the . . . day of . . . , 187. . . in the county of . . . and State of Iowa, did feloniously, willfully and maliciously maim a certain mare, of the property of one J M, by then and there striking the said mare with a club in the left eye, and then and there and thereby destroying the said left eye, and permanently blinding the said mare in the same, contrary to and in violation of law.

INDICTMENT—INFORMATION.

Under the Texas statute for the protection of dumb animals the indictment or information need not allege the owner's name of the animal, but when alleged it must be proven. *Rose v. State*, 1 Texas Court of Appeals, 400.

AVERMENT OF OWNERSHIP.

It is held under the laws of Alabama not to be necessary to allege the name of the owner of the animal injured. *State v. Pierce*, 7 Alabama, 723; *State v. Brocker*, 32 Texas, 611; overruling *State v. Smith*, 21 Texas, 748; *Benson v. State*, 1 Texas Court of Appeals, 6.

DESCRIPTION OF ANIMALS.

It is sufficient to describe the animal as a "certain horse, a dumb animal, under the statute," and not necessary to allege the color. *Benson v. State*, 1 Texas Court of Appeals, 6.

INDICTMENT—ALLEGATION AS TO CHARACTER OF BEAST.

In an indictment for killing a hog it is not necessary to allege that the animal killed was a "domestic beast." *State v. Enslow*, 10 Iowa, 116; and, under a law punishing the killing of cattle, it was held unnecessary to aver that the animals killed were cattle, in order to bring them within the statute. 2 Bla., 721, 733; and pigs were held to be cattle, within the act. *Rex v. Chaple*, Mich. R., 1804; and Russ. and Ry., 47; 2 East, P. Co. 1076; *State v. Enslow*, 10 Iowa, 116.

DUP LICITY.

Where the indictment charged that the defendant did maliciously "maim and disfigure," etc., it is not bad for duplicity. *State v. Harris*, 11 Iowa, 414; *State v. Cooster*, 10 Iowa, 453.

ELEMENTS—MALICE.

As to whether malice must be shown toward the owner, *quere*. *State v. Enslow*, 10 Iowa, 116. It is said that malice toward the owner is the ingredient of this offense, in *State v. Harris*, 11 Iowa, 415.

MAIMING—DISFIGURING.

The maiming of a domestic animal implies some permanent injury. The disfiguring of such animal implies a lower grade of offense, and embraces any injury, however slight, which is made with malice toward the owner, and which is of a character to lessen the value of the animal. *State v. Harris*, 11 Iowa, 414.

To shave a horse's mane or tail is a disfiguring of the horse, but the injury is not of a permanent character; so the cutting off the hair, or cutting the skin of a cow or an ox would tend to destroy the beauty or symmetry of the animal, and would, although not of a permanent character, be an indictable offense. *State v. Harris*, 11 Iowa, 415. So, it is said: "Such an act discovers a degree of moral turpitude dangerous to society, and for their security ought to be punished criminally. It is an evil example of the most pernicious tendency, inasmuch as the act is an outrage upon the principles and feelings of humanity." *People v. Smith*, 5 Cowen, 258; *Respublica v. Teischer*, 1 Dal., 335; *State v. Briggs*, 1 Ark. R., 226; *Commonwealth v. Leach*, 1 Mass., 59; *Kilpatrick v. People*, 5 Denio, on page 280.

TRESPASS—DISTINCTION.

The offense of maiming and disfiguring is distinguishable from an ordinary trespass in this, "that it is not only a violation of private right, without color or pretense, but without the hope or expectation of gain." *People v. Smith*, 9 Cowen, 258; 5 Park, Cr. R., on page 575.

For cruelty to animals see title "Cruelty to Animals by Torturing," etc.

LARCENY.

SECTION 3902. If any person steal, take, and carry away of the property of another, any money, goods or chattels; any writ, process, or public record; any bond, bank note, promissory note, bill of exchange, or other bill, order, or certificate; or any book of accounts respecting money, goods, or other things; or any deed or writing containing a conveyance of real estate; or any contract in force; or any receipt, release, or defeasance; or any instrument or writing whereby any demand, right, or obligation is created, increased, extinguished or diminished, he is guilty of larceny, and shall be punished, when the value of the property stolen exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than five years; and when the value of the property stolen does not exceed the sum of twenty dollars, by fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days.

SEC. 3903. If any person in the night time commit larceny in any dwelling house, store, or any public or private building, or in any boat, vessel, or water craft, when the value of the property stolen exceeds the sum of twenty dollars, he shall be imprisoned in the penitentiary not exceeding ten years; and when the value of the property stolen is less than twenty dollars, by fine not exceeding three hundred dollars, and imprisonment in the county jail not exceeding one year.

SEC. 3904. If any person in the day time commit larceny as specified in the preceding section, and the value of the property stolen exceeds twenty dollars, he shall be punished by imprisonment in the penitentiary not more than five years; and when the value of the property stolen is less than twenty dollars, by fine not exceeding two hundred dollars, and imprisonment in the county jail not exceeding one year.

SEC. 3905. If any person commit the crime of larceny by stealing from any building on fire; or by stealing any property removed in consequence of an alarm caused by fire; or by stealing from the person of another, he shall be punished by imprisonment in the penitentiary not exceeding fifteen years.

SEC. 3906. If any person falsely personate or represent another, and in such assumed character receive any money or property intended to be delivered to the person so personated, with intent to convert the same to his own use, he is guilty of larceny, and shall be punished accordingly.

SEC. 3907. If any person come, by finding, to the possession of any personal property of which he knows the owner, and unlawfully appropriate the same, or any part thereof, to his own use, he is guilty of larceny, and shall be punished accordingly.

SEC. 3909. If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of a co-partnership, or if any person over the age of sixteen years, embezzle and fraudulently convert to his own use, or take and secrete with intent to convert to his own use, without the consent of his employer or master, any money or property of another which has come to his possession or is under his care by virtue of such employment, he is guilty of larceny and shall be punished accordingly.

SEC. 3910. If any carrier or other person to whom any money, goods or other property, which may be the subject of larceny, has been delivered to be carried for hire, or if any other person entrusted with such property, embezzle or fraudulently convert to his own use any such money, goods or other property, either in the mass as the same were delivered or otherwise, and before the same were delivered at the place or to the person where and to whom they were to be delivered, he is guilty of larceny and shall be punished accordingly.

SEC. 3911. If any person buy, receive or aid in concealing any stolen money, goods or any property, the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, he shall be punished, when the value of the property so bought, received or concealed by him exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year; and when the value of the property so bought, received or concealed by him does not exceed the sum of twenty dollars, by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

SEC. 3912. If any person after having been convicted of the offence of buying, receiving or aiding in the concealment of stolen money, goods or any property, the stealing of which is larceny, or property obtained by robbery or burglary, be again convicted of the like offense, or if any person at the same term of court is convicted of three distinct acts of buying, receiving or aiding in the concealment of stolen property, or property obtained by robbery or burglary, knowing the same was so obtained, he shall be punished as provided in the preceding section.

SEC. 3913. In any prosecution for the offense of buying, receiving or aiding in the concealment of stolen property, or property obtained by robbery or burglary, knowing the same was so obtained, it shall not be necessary to aver, nor to prove on the trial thereof that the person who stole, robbed or took the property has been convicted.

SEC. 3914. If the property stolen consist of any bank-note, bond, bill, covenant, bill of exchange, draft, order or receipt, or any evidence of debt whatever, or any public security, or any instrument whereby any demand, right or obligation may be assigned, transferred, created, increased, released, extinguished or diminished, the money due thereon or secured thereby and remaining unsatisfied, or which in any event or contingency might be collected thereon, or the value of the property transferred or affected, as the case may be, shall be adjudged the value of the thing stolen.

SEC. 3915. If any person knowingly and without authority of law, take, carry away, secrete or destroy any goods or chattels while the same are lawfully in the custody of any sheriff, coroner, marshal, constable or other officer, and rightfully held by such officer by virtue of execution, writ of attachment, or other legal process issued under the laws of Iowa, he shall be deemed guilty of larceny, and shall be punished, when the value of the property, so taken, carried away, secreted or destroyed exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than one year; and when the value of the same does not exceed twenty dollars, by fine not exceeding one hundred dollars, or imprisonment in the county jail not more than thirty days.

SEC. 3916. The possession or custody of goods and chattels by any person with whom the same have been left or deposited for safe keeping, to be returned for the purpose of being disposed of on legal process, shall be deemed to be the possession and custody of the officer having or depositing the same, and entitled to the custody thereof, and in a prosecution under the preceding section, the property taken, carried away, secreted or destroyed, as therein mentioned, may be laid in the officer entitled to the custody thereof at the time of the commission of the offense.

SEC. 3895. If any mortgagor of personal property, while his mortgage of it remains unsatisfied, willfully destroy, conceal, sell, or in any manner dispose of the property covered by such mortgage without the consent of the then holder of such mortgage, he shall be deemed guilty of larceny, and be punished accordingly. [Limitation by Section 4167, if the property stolen exceeds twenty dollars, three years; if less, by Section 4168, one year.]

Form of Indictment.

THE STATE OF IOWA } In the District Court of . . . county, . . . term, 1878-
vs. } Larceny.
. } Indictment.

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of larceny, committed as follows: The said . . . , on the . . . day of . . . , 187 . . . , in the county of . . . , and State of

Iowa, did unlawfully and feloniously steal, take, and carry away, one horse of the value of one hundred dollars, and the property of A B, contrary to law.

Or, four pieces of gold coin, of the denomination of ten dollars, and each of the value of ten dollars, and in the aggregate of forty dollars. [Form approved, *State v. Cokley*, 4 G. Greene, 484.]

Or, one bank note, designated, known and called Clarke's Exchange Bank Bills, of the value of twenty dollars. [*State v. Cokley*, 4 G. Greene, 484; *State v. Hoppe*, 39 Iowa, 468; *Kent v. People*, 1 Douglass, Mich., 42; *Commonwealth v. Richards*, 1 Mass., 336.]

Or, one watch, of the value of . . . ; one silver coin, of the value of . . . ; one five dollar gold piece, of coinage of the United States, of the value of . . . ; one promissory note, for the payment of money commonly called a bank-note, purporting to be issued by the St. Croix Valley Bank, for the payment of ten dollars, being still due and unpaid, of the value of ten dollars and the property of . . . [*State v. Bond*, 8 Iowa, 541; *People v. Holbrook*, 13 Johns., 90; *People v. Jackson*, 8 Barb., 637, Wharton's Cr. Law, 178-180.]

Or, one certain United States Treasury note, of the denomination of ten dollars, and of the value of ten dollars and the property of . . . [*State v. Cunningham*, 21 Iowa, 433.]

Or, one hundred dollars in bank notes, usually known and described as green-backs [*State v. Hockenberry*, 30 Iowa, 504; 2 Gr. Cr. R., 481; *State v. Stevens*, 62 Maine, 284.]

Or, one ten dollar bank bill, commonly denominated National Currency and of the value of ten dollars. [*State v. Hoppe*, 39 Iowa, 468.]

Or, one hundred dollars of money in bank bills, the numbers and description of which are to these grand jurors unknown, and of the value of one hundred dollars and the property of . . . [The last form is held good in *Brown v. People*, 20 Mich., 232.]

Or, under section 3911, did, on, etc., at, etc., forty-eight yards of carpeting of the value of . . . of the goods, chattels and property of one . . . then and there being lately before feloniously stolen, taken and carried away, unlawfully and feloniously did receive, buy and conceal, with intent thereby to defraud the said . . . owner thereof, and he, the said . . . , then and there well knowing said goods, chattels and property to have been feloniously stolen as aforesaid, contrary, etc. [Approved in *Shriedley v. State*, 23 Ohio St., 138.]

Or, two steers or work cattle, each of the value of fifty dollars. [*Wessell v. Territory of Kansas*, McCahon's Kan. R., 100.]

Or, six hundred and ten pounds of silver bearing ore. [Held to be a sufficient description in *State v. Berryman*, 8 Nev., 262; 1 Gr. Cr. Rep., 335.]

Or, under section 3905, did unlawfully and feloniously take, steal, and carry away one clock, of the value of . . . and the property of . . . from a certain frame building then and there situate in Marion county, and state aforesaid, the said building being then and there on fire (or, being in said building, having been removed from another building, in consequence of an alarm caused by fire).

Or, one certain pocket-book, containing the sum of . . . dollars in currency, and the property of . . .

Or, under section 3905, did convey by chattel mortgage to one . . . a certain article of personal property of the goods and chattels of the said defendant, to-wit: one spotted four-year old cow, to secure the said . . . the payment of . . . dollars on demand, and that afterwards, to-wit: on the . . . day of . . . in the county and state as aforesaid, and while the said mortgage remained unsatisfied, and the lien, created by the mortgage aforesaid, being still in existence and force, the said . . . , without the consent of the then holder of said mortgage, willfully and unlawfully did sell and dispose of said cow, mortgaged as aforesaid, and being of the value of one hundred dollars, whereby the said . . . is deemed to have committed the crime of larceny, and the jurors aforesaid, upon their oaths aforesaid, do aver, find and present that the said . . . on the . . . day of . . . in the county and state aforesaid, in the manner and form aforesaid, the said cow of the property of . . . feloniously did steal, take and carry away, contrary, etc.

INDICTMENT—OWNER.

It is essential in all indictments for larceny to allege the name of the owner of the property stolen. Roscoe's Cr. Ev., 656; *Commonwealth v. Morse*, 14 Mass., 218.

PARTIAL OWNER—BAILEE.

Where a person has a special property in a thing, or holds it in trust for another, such as a landlord, mechanic, carrier, baggage-master, etc., the property may be laid in either the real owner or the bailee. 2 Whart. Am. Cr. Law, Sec. 1824; *State v. Mullen*, 30 Iowa, 203.

RECEIVING STOLEN GOODS.

Under an indictment for receiving stolen goods, the name of the original thief need not be given. 2 Bishop's Cr. Pro., Sec. 927; *Shriedly v. State*, 23 Ohio St., 139.

SEVERAL OWNERS.

Where the defendant steals several articles of different owners at the same time and place, it may be embraced in one count and charged as one offense. 2 Gr. Cr. Rep., 541; *Shriedly v. State*, 23 Ohio St., 339; *State v. Mullen*, 30 Iowa, 204; *Quitzo v. State*, 1 Texas Court of Appeals R., 47.

CORPORATE BODY AS OWNERS.

Where the property belongs to a corporation, it should be alleged that such is a corporation, in addition to its name; and where the property is vested in a body of persons not incorporated, the ownership must be laid in their individual names composing the company. 2 Gr. Cr. Rep., 562; *Wallace v. People*, 63 Ills., 451; 2 Russ. on Crimes, 7th ed., 100; Whart. Cr. Law, 4th ed., Sec. 1828; Roscoe's Cr. Ev., 661.

WIFE'S PROPERTY.

If the stolen property belongs to the wife the ownership should be laid in her and not her husband. 2 Gr. Cr. Rep., 717; *Stevens v. State*, 44 Ind., 469.

MORTGAGE BY OWNER.

The fact that the owner had given a mortgage on the stolen property does not impair his title so as to affect his ownership. *State v. Quick & Mullen*, 10 Iowa, 451.

MINGLED GOODS.

Where the property of one is intermingled with that of another, the ownership is still properly laid in one of the parties. *People v. Williams*, 24 Mich., 157.

VALUE OF STOLEN PROPERTY.

The value of the property stolen should always be set out to properly inform the defendant, as well as to guide the court in its sentence. Especially so where the statutes provide different degrees of punishment for larceny above or below a certain sum. *Morgan v. State*, 1 Gr. Cr. Rep., 349 and 361; *Shepherd v. State*, 1 Texas Court of Appeals, 522; *Merwin v. The People*, 26 Mich., 298; *Commonwealth v. Smith & Titcomb*, 1 Mass., 246; Roscoe's Cr. Ev., 656; *State v. Goodrich*, 46 N. H., 186; *Hope v. Commonwealth*, 9 Metc., 134; 2 East. Crown Law, 798; *State v. Dolby*, 6 Am. Rep., 590; *Morgan v. State*, 13 Fla., 671.

VALUE OF SEVERAL ARTICLES TOGETHER.

To give the value of a buggy and harness together, without giving the separate value of each, is held good. *State v. Hart*, 29 Iowa, 269; *Clifton v. State*, 5 Blackf., 224; *State v. Murphy*, 8 Ib., 498.

VALUE—VARIANCE.

Where the indictment alleges the value sufficient to make it grand larceny, while the evidence reduces the value to the crime of petit larceny, a conviction is still proper under an indictment for grand larceny charging its commission in the day time in a dwelling. *State v. Dawson*, 17 Iowa, 584; *State v. Murphy*, 8 Blackf., 498; *State v. Dolby*, 6 Am. Rep., 590.

ALLEGATION OF VALUE.

The allegation of value is not a matter of form but of substance, and therefore cannot be amended as to value. *State v. Goodrich*, 46 N. H., 186; *State v. Dolby*, 6 Am. Rep., 594.

DESCRIPTIONS AND ALLEGATIONS GENERALLY.

Under section 3902, it is sufficient to allege that the breaking and entering was done with intent to commit larceny, without averring that it was with intent to steal, etc. *State v. Jones*, 10 Iowa, 207.

BANK BILLS—DESCRIPTION.

In larceny a copy of the bank note is not required; a general description is sufficient. *McMillen v. State*, 5 Ohio, 269.

KIND AND DENOMINATION.

The merely charging defendant with having stolen goods is insufficient. The kind, denomination and value of each article should be specifically set out. 1 Gr. Cr. Rep., 349; *Merwin v. People*, 26 Mich., 298.

GENERAL FORM.

The usual form is, "feloniously stole, took, and carried away," etc. 1 Hale's P. C., 165; *Reg. v. Middleton*, 1 Gr. Cr. Rep., 4.

ANIMALS—DESCRIPTION OF COLOR, ETC.

It is not necessary to describe the color of an animal; but where the color and particular description is given, it is incumbent on the State to prove it, and a failure to do so is fatal. *Turner v. State*, 1 Gr. Cr. Rep., 355; 3 Heiskell, Tenn., 452; 1 Greenlf. Ev., Sec. 65, 12th ed.

So the word "horse," in its generic sense, includes all animals of the horse kind, of whatever age or sex; but where the indictment charges the theft of a filly, while the proof showed the animal to be a mare, the conviction is set aside. *Lunsford v. State*, 1 Texas Court of Appeals R., 448. So, where the charge is the theft of a gelding of a certain brand, and the evidence proved a different brand, held, that inasmuch as a particular description was given it must be proved. So as to a black or brown horse, if the color is given, it must be proven as alleged. *United States v. Howard*, 3 Sumn., 12; *State v. Noble*, 15 Me., 476; 30 Me., 29; *Hill v. State*, 41 Texas, 257; *Ranjil v. State*, 1 Texas Court of Appeals R., 461.

CATTLE—DESCRIPTION OF.

In charging theft of cattle, a designation of its species is sufficient, as cow, steer, ox, and the like, without use of the generic term "cattle." *State v. Lange*, 22 Texas, 591; *Hubotter v. State*, 32 Texas, 483; *State v. Hambleton*, 20 Mo., 452; *State v. Abbott*, 20 Vt., 537; *Tyler v. State*, 6 Humph., 285; *Robertson v. State*, 1 Texas Court of Appeals R., 311.

MONEY—DESCRIPTION OF GENERALLY.

In the description of money it is often impossible to describe it definitely. It is therefore held, by the most authorities, that

a general description is sufficient; and, in cases of bank bills, it is not absolutely necessary to give the name of the bank, the denomination and number being held sufficient. *State v Stevens*, 62 Maine, 284; 2 Gr. Cr. R., 481; *Commonwealth v. Richards*, 1 Mass., 337; *Eastman v. Commonwealth*, 4 Gray, 416; *People v. Holbrook*, 13 Johns., 90; *People v. Kent*, 1 Douglass Mich., 42.

UNCERTAINTY OF DESCRIPTION.

To aver "one hundred pounds of meat" is too uncertain, as the term may be applied to all kinds of provisions. 2 Wis., 294.

DWELLING HOUSE—RESIDENCE—CONSTRUCTION.

The words "dwelling house" as generally used in an indictment, mean the residence of the prosecuting witness or party, and that he occupied it as such at the time of the commission of the crime, and are held to be good under the common, as well as statute law. 20 Wis., 599.

JURISDICTION IN DIFFERENT COUNTIES.

See "Jurisdiction."

MORTGAGED PROPERTY, SELLING OF.

The indictment under the Texas laws should allege that the offense was done feloniously. *State v. Small*, 31 Texas, 184; *Satchell v. State*, 1 Texas Cr. R., 438.

LIEN STILL SUBSISTING.

The indictment must allege that the claims or lien is still justly subsisting, valid and unpaid at the time of the commission of the offense. *State v. Devereux*, 41 Texas, 383; *State v. Maxey*, 41 Texas, 524; *Satchell v. State*, 1 Texas Court of Appeals, 438.

MISTAKE IN CHATTEL DESCRIBED.

Under an indictment for fraudulently disposing of mortgaged property, it is not admissible to allege in the indictment and prove on trial a mistake in the description of the mortgaged property in the mortgage. In civil cases this evidence may be admissible, but in a criminal case it is not, where the instrument in writing is the basis of the prosecution. *Barclay v. State*, 55 Ga., 179, 1 Am. Cr. R., 636.

JURISDICTION AS TO STATES—PROPERTY STOLEN IN ONE, AND
DEFENDANT FOUND AND TRIED IN ANOTHER.

Under the common law a conviction could not be sustained where the property was stolen in a foreign country. 1 Moody, Cr. Cases, 349; 9 Carr & P., 29; 2 East P. C., 772; but by statutes, afterwards, 13 Geo., 3 C., 31, sections 4 and 7, prosecutions were authorized in any county in which the thief was found in possession of stolen goods, in any part of the United Kingdom. In regard to this question there seems to be a conflict of authorities.

It is held, where the defendant steals property in a sister state, and brings the same into another, that he may be convicted of larceny in any county where he is found with the stolen property. And that is not upon the theory that a crime has been committed in a sister State, but upon the principle that the continued possession of stolen property, is, in itself, a full and complete larceny under general laws punishing larcenies. *State v. Bennett*, 14 Iowa, 479; 3 Conn., 185; 36 Miss., 593; 2 Oregon, 115; 1 Duvall, 153; *Com. v. Cullens*, 1 Mass., 116; *Com. v. Andrews*, 2 Ib., 14; *Hamilton v. State*, 11 Ohio, 435; 2 East P. C., 774; 1 Har & John, M. D., 140; to the same effect are, *People v. Burke*, 11 Wendell, 129; *Morrissey v. People*, 11 Mich., 328; *McFarland v. State*, 4 Kan., 68; but these last three cases are based upon statutes of their several states, providing, that where stolen property is brought into their states, the defendant may be convicted in the latter states, which statutes have been held to be constitutional. 9 Am. R., 119; *People v. Williams*, 24, Mich., 156. A contrary doctrine is held in *People v. Gardner*, 2 Johnson, 477; *People v. Schenk*, 2 Ib., 479; these two cases being determined previous to that of *People v. Burke*, 11 Wendell, 129, which is based on the New York statute, to the same effect as in Johnson. 2 Vroom, N. J., 82; 5 Binn., Penn., 617; 1 Hayn, N. C., 100; 4 Humph., Tenn., 456; 15 Ind., 378; 14 L. An., 278; *Stanley v. State*, 24 Ohio St., 166; *People v. Loughridge*, 1 Nebraska, 11; and the case cited in 3 Gray, 434, Mass., did not overrule the cases cited in 1st and 2nd Mass., 116-14; but based the decision on the ground that the property was stolen in a foreign country. But in the two

cases of 11 Vt., 650, and 49 Maine, 181, these courts held that although the property was stolen in the British Provinces, and the property was afterwards taken into these United States, their courts would have jurisdiction.

AS TO COUNTIES—VENUE.

The venue may be laid in any county in which the thief was possessed of the stolen property. Whart., Am. Cr. Law, 4th ed., Secs. 264, 603-1812; *Com. v. Dewitt*, 10 Mass., 154; 47 Miss, 671; 1 Green, 341. And the indictment should charge the crime to have been committed in the county where the property is found; 3 Greenleaf Ev., 8th ed., Sec. 152; *Haskins v. People*, 16 N. Y., 348; 4 Park Cr. R., 255; 17 Me., 195; 21 Ib., 19; 49 Ib., 185; 40 Cal., 654; 1 Gr. Cr. R. 344.

ELEMENTS—SEVERANCE.

There must be a complete severance of the goods from the possession of the owner. For instance, the defendant takes a pocket book out of the owner's pocket, the purse being tied to a bunch of keys, and the keys remaining in the pocket, and defendant being apprehended while they remained in his pocket, it is not larceny. 1 Hale P. C., 508; 2 East. P. C., 556; Roscoe's Cr. Ev., 7th ed., 624; *Harrison v. People*, 10 Am. R., 517.

TRESPASSING ANIMALS.

Taking a horse, trespassing on the taker's land, with intent to conceal it until a reward is offered, or until the owner is induced to sell it for less than its value, is larceny. *Com. v. Mason*, 105 Mass., 163; *Com. v. Mason*, 7 Am. R. 507; 2 East P. C., 659.

POSSESSION OBTAINED THROUGH FRAUD, ARTIFICE OR TRICK.

Where the property is obtained by device or fraud, it is larceny. 2 East. P. C., 689; 1 Leach, 409; 2 Russ., 113-127; 8 Am. R., 5; 3 Heiskell, Tenn., 53; *Cary v. Hotailing*, 1 Hill, 311; Whart. Am. Cr. Law, Sec. 1847; *Smith v. People*, 13 Am. R., 474; 53 N. Y., 111; 1 Gr. Cr. R., 30; 12 Cox's Cr. Cases, 269; 1 Gr. Cr. R., 46; 12 Cox's Cr. Cases, 512; 1 Gr. Cr. R., 356; 2 Cr. Ib., 16; Roscoe's Cr. Ev., 7 ed., 630,

631; *State v. Brown*, 25 Iowa, 561; 2 Gr. Cr. R., 613; *Loomis v. People*, 67 N. N., 322; 23 Am. R., 153.

SILVER BEARING ORE.

The removal and taking silver bearing ore, with intent to steal, is larceny. 1 Gr. Cr. R., 335; 8 Nevada, 262.

ANIMALS AND THEIR PRODUCTS.

Domestic animals, such as horses, oxen, sheep, etc., or poultry, as hens, ducks, geese, etc., are the subjects of larceny. And it being a crime to steal the animals, it is also a crime to steal the products of any of them. 1 Hale P. C., 511; Roscoe's Cr. Ev., 7th ed., 498.

MILKING COWS.

The milking of cows at pasture, and stealing the milk, is larceny. 2 East. P. C., 617; Roscoe's Cr. Ev., 498.

WOOL OF SHEEP.

The pulling of wool from sheep is also larceny. 2 East., 618; Ros., 498.

BEE HIVES.

The taking of bees and bee hives constitutes the crime of larceny. 2 East., 607; Roscoe, 498.

ANIMALS GENERALLY.

Under the common law all animals, either tamed or domesticated, which served for food, were the subjects of larceny, and that doctrine is still upheld. For a discussion of this subject generally, see, Roscoe's Cr. Ev., 7th ed., 499.

Dogs.

Under the common law a dog was not the subject of larceny, as those animals which do not serve for food, the law holds, to have no intrinsic value. Dogs of all sorts, and animals kept for whim or pleasure, though a man may have a bare property therein, are not of such estimation that the crime of larceny attaches. It cannot be committed as to some things, whereof the owner might have a lawful property, and such whereupon he might maintain an action of trespass, nor of some things wild by nature, yet reclaimed by art

or industry, because they served not for food but pleasure. 4 Blackstone, Com., 235, 236; 1 Hale P. C., 510-511; 2 East. P. C., 607; Roscoe's Cr. Ev., 7th ed., 499; *Warren v. State*, 1 G. Greene, 106. By subsequent acts, this law was changed or modified so as to make the stealing of dogs punishable. 10 Geo. III C., 18.

NEW YORK STATUTE.

Under the statutes of New York, a dog is the subject of larceny. 2 R. S., page 679, section 63; 1 Park Cr. R. 593; 2 Ib., 386.

From the reading of the authorities last cited it would seem, at first blush, that dogs are the subject of larceny, and no doubt they are, under the decisions cited in that state, but on a closer examination, we are led to believe that such is not the law in most of the states, and that dogs are not the subject of larceny. Such was the doctrine under the common law up to the time of the change by special statute. 10 Geo. C., 18, as well as that of the state of New York, and to which the New York cases agree as far as consistent. They say with their statute, in 1 Park, cited, Dean, J. says: "But the common law has been adopted in this state, and I do not feel disposed, by judicial legislation to abrogate any part of it. If we had no statute which was in conflict with it, I should feel bound by the ancient doctrine which I have cited." So in 4 Park, above cited, Russell, J., referring to the New York statute says: "As I understand Sec. 63, of our statute, it is ment to define the offense of grand larceny, in reference to personal property, and to declare that everything which is personal property, which can be, or is held or enjoyed as personal property, is within the protection of the statute; we observe that when the common law was changed by 10 Geo., making it punishable to steal dogs, yet no such provisions or change was made in the New York statutes, on which the two decisions are based."

A general statute like that of Iowa, Massachusetts, and other states, referring to personal property, but not including dogs, nor making any mention of them, as being property, or subjects of larceny, cannot be construed as making them such, so that our statutes are the same in substance as the common

law, previous to the change by 10 Geo. We find in the same state, cases, holding that dogs may be declared nuisances and killed. *Putnam v. Payne*, 13 Johnson, 312; *Hinckley v. Emerson*, 4 Cowen, 351; *Brill v. Flagler*, 23 Wendell, 356; and in the case first cited, 13 Johnson, the court in conclusion remark "that the right to kill dogs did not apply to more useful and less dangerous animals, as hogs, etc." We also find an exception to dogs in Roscoe's Cr. Ev., 7th ed., 334: "A dog is not within the meaning of the statute relating to obtaining property by false pretences." In one of the New York cases it is said "that we may infer that dogs are personal property, from the fact that laws are passed requiring taxes to be paid on each dog." Such a statute was passed in Iowa by chapter 76, page 76, Laws of 1862, and repealed by subsequent legislation, chapter 20, page 18, extra session, 1862. To this it might be said that these laws are not passed for the purpose of recognizing them as property, but as a sort of police regulation. 100 Mass., 136; 42 N. H., 373; 16 Wis., 298; regarding them as an evil and nuisance to society. 1 Metcalf, 555; and a law is deemed necessary, to decrease their number by imposing taxes; as said by Rhodes, C. J., "It is insisted on behalf of the defendant, that a person may lawfully keep a ferocious dog. That position may be conceded that he has the same right to keep a tiger." *People v. Klumpke*, 41 Cal., 138; 10 Am. Repts., 269. The Iowa statute is similar, and in substance like the New York and Massachusetts statutes. In Iowa we have had but one adjudicated case in relation to dogs—in *Anson v. Dwight*, 18 Iowa 242. This was a civil action, brought to recover the value of a dog killed by defendant, but as to the question of dogs being property, neither party raised the question, but the court, per Cole, J., says: "Dogs may be personal property and have value, and are, in such case, within the rule." The question arose in this case on the admissibility of evidence as to the value of the dog alleged to be killed. The Supreme Court of Massachusetts, in a case brought against an officer in a civil proceeding for killing dogs not licensed, in discussing the question as to the value of dogs and as to their being property, it is said, per Gray, J., "In regard to the ownership of

live animals, the law has long made a distinction between dogs and cats, and other domestic quadrupeds, growing out of the nature of the creatures, and the purposes for which they are kept. Beasts which have been thoroughly tamed, and are used for burden or husbandry, or for food, such as horses, cattle and sheep, are as truly property of intrinsic value, and entitled to the same protection as any kind of goods. But dogs and cats, even in a state of domestication, never wholly lose their wild and destructive instincts, and are kept, either for uses which depend on retaining and calling into action those very natures and instincts, or else for the mere whim or pleasure of the owner, and, therefore, although a man might have such right of property in a dog as to maintain trespass or trover for unlawfully taking or destroying it, yet he was held, in the phrase of the books, to have no absolute and valuable property therein, which could be the subject of a prosecution for larceny at common law, or even, according to the same authorities, of an action of detinue or replevin, or a distress for rent, or which would make him responsible for the trespasses of his dog on the lands of other persons, as he would be for trespasses of his cattle, citing also, in support, 8 Cox's Cr. Cases, 115. And dogs have always been held by the American courts to be entitled to less legal regard and protection than more harmless and useful domestic animals. *Putnam v. Payne*, 13 Johnson, 312; 26 Vt., 638; 31 Conn., 121. In *State v. Lymus*, 26 Oh. St., 400, and 20 Am. Rep., 772, where the defendant was indicted for breaking into a stable in the night season with intent to steal a dog, in the opinion delivered by Rex, J., he says, *inter alia*, "We have no statute that in express terms declares a dog to be the subject of larceny; but it is claimed that, inasmuch as the right of property in dogs is protected by civil remedies, and as a recent statute of this state requires them to be listed for taxation, they are property, and, therefore, properly the subjects of larceny. We do not think so. It will be time enough to say that a dog is a subject of larceny when the law-making power of the state has so declared." White and McIlvaine, JJ., concurring, Welch, C. J., and Gilmore, J., dissenting.

ANIMALS FERÆ NATURÆ.

It is a well-settled principle of law that animals *feræ naturæ* are not the subject of larceny, though the right of the owner would be protected by civil action. Roscoe's Cr. Ev., 499; *Warren v. State*, 1 G. Greene, 106; 5 N. H., 204.

Ferrets, though tame and salable, are not the subject of larceny.

ANIMALS DEAD AND THEIR FUR.

An otter is an animal valuable for its fur, and though it be one *feræ naturæ*, yet if it be reclaimed, confined or dead, the stealing it from its owner is larceny. Roscoe's Cr. Ev., 499; 65 N. C., 315; 6 Am. Repts., 744.

DRAFTS, NOTES AND BILLS.

A draft, note or bill is the subject of larceny, and also of embezzlement. *State v. Orwig*, 24 Iowa, 103.

PROPERTY ENTRUSTED.

Where property is entrusted, and appropriated while entrusted, it is not larceny, but embezzlement. *Whipple v. Abbott*, 3 G. Greene, 67.

INTOXICATING LIQUOR.

Liquor, though kept in violation of law, is the subject of larceny. *State v. May*, 20 Iowa 305; *Com. v. Bourke*, 10 Cushing, 397; 2 East P. C., 654.

TAKING, WHAT CONSTITUTES.

The sale of an animal to another, and authorizing him to take it from a pound, constitutes such a taking as makes the act of the defendant criminal. *State v. Hunt*, 45 Iowa, 673.

STEALING STOLEN PROPERTY.

A person can be convicted of stealing stolen property from a thief. 1 Hale P. C., 507; *People v. Hulse*, 3 Hill, 309; 2 Bishop Cr. Law, Sec. 690; *State v. May*, 20 Iowa, 308.

STEALING ONE'S OWN PROPERTY.

A man may be guilty of stealing his own property, when done with the intent to charge another person with the value of it. 2 East. Cr. Law, 558; 1 Hawkins, Chap. 33, Sec. 30.

TRESPASS—INGREDIENT TO LARCENY.

At common law there could be no larceny without trespass. This is, however, changed by the Iowa Code, section 3906, so that trespass is not a necessary ingredient to larceny. *State v. Brown*, 25 Iowa, 561.

FALSE PRETENCES—DISTINCTION.

Where the property is delivered to the defendant himself on certain false pretences, the prosecutor delivering the title and possession, it is not larceny. But where goods are delivered to a third party, who did not buy them, they being sold at the request of the defendant and then delivered from such third party to the defendant, such delivery does not pass a title from the prosecutor to the defendant, and the acts of defendant in procuring goods in that manner is larceny. *People v. Jackson*, 3 Park., 390.

RECEIPTS.

A receipt, under the New York statute is not the subject of larceny, but under the Iowa Code it is, the word "receipt" being incorporated in the section. *People v. Bradley*, 4 Park. Cr. Rep., 245.

ELOPEMENT.

Where a defendant eloped with the prosecutor's wife, taking the horse of the prosecutor with them, and selling the same, the defendant taking the money, he may be convicted of larceny. 12 Cox's Cr. Cases, 19; *Reg. v. Harrison*, 2 Gr. Cr. Rep., 31.

ICE.

When ice is put in an ice-house for domestic use, it becomes a subject of larceny, but not so while in a river. *Ward v. People*, 6 Hill, 144.

TAKING TEAM AND CARRIAGE—INTENT.

Where the prisoner ran away with a horse and carriage without the owner's knowledge or consent, and with no intention of returning them, and afterward abandoned them in the street, held to be larceny. *State v. Davis*, 9 Vroom., 176; 20 Am. Rep., 367.

THEFT OF SEVERAL ARTICLES.

The theft of several articles at one and the same time, and by one and the same act, constitutes but one indivisible crime, and a judgment of conviction or acquittal of the theft of one of the articles is a bar to a prosecution for the theft of the others. *State v. Damon*, 2 Tyler, 387. So the stealing of a horse, saddle and bridle is but one act. *State v. Williams*, 10 Humph., 101; *Ben v. State*, 22 Ala., 9; *Rea v. Benfield*, Burr, 980; *Clem v. State*, 42 Ind., 420; 1 Texas Court of Appeals R., 47.

THEFT OF DIFFERENT OWNERS.

The stealing of different articles of property, belonging to different persons, at the same time and place, so that the transaction is the same, is but one offense against the State; and the defendant cannot be convicted on separate indictments. *Wilson v. State*, as cited in 1 Texas Court of Appeals R., 54; *Wilson v. State*, 45 Texas, 76; 23 Am. R., 602.

MASTER AND SERVANT.

The fact that a servant has charge of his master's property does not give him the possession, but that remains in the master. And the servant may commit larceny by converting the property with which he was intrusted. So, where the payor of a note takes it into his possession to make an indorsement thereon, and then refuses to deliver the same to the payee, he is guilty of larceny. Code, Sec. 3910; 2 East. P. C., 564; 2 Hale's P. C., 506; 1 Leach, 285; 2 Ib., 805; 9 Carr & Payne, 344; Ib., 353; 2 Moor., 32; *People v. Call*, 1 Denio., 123; *Reg. v. Hennessey*, 35 Q. C. Q. B., 603; *State v. McDaniel*, 1 Am. Cr. R., 403.

CARRIER—GOODS ENTRUSTED—SEPARATION—CONVERSION.

From the adjudicated cases, it seems to be settled that where a package, or various packages of goods, are delivered and entrusted to a carrier for transportation, and where he opens the package or bulk, and takes therefrom any portion, and converts the same, it is larceny and not embezzlement. But where he takes the whole package or goods in bulk, it is embezzlement and not larceny. Arch. Cr. Pl., 384; East. Cr. L., 697; 2 East.

Cr. Law, 697; 1 Hale, 504; 7 Carr & Payne, 325; *Commonwealth v. Brown*, 4 Mass., 580; 4 Carr & Payne, 545; 5 Ib., 533; *Nichols v. People*, 17 N. Y., 114.

POSSESSION OF PROPERTY AS SERVANT.

The fact that a person is in the employ of a railroad company, does not imply such control or possession of goods, that he may not be convicted of larceny. *Manson v. State*, 24 Ohio St., 590.

EVIDENCE—POSSESSION OF STOLEN PROPERTY.

If the prosecution rests its case on possession of the fruits of the crime alone, then the possession should be absolute and conclusive. *Lewis v. State*, 4 Kan., 298.

SUFFICIENCY OF.

Where it is shown by sufficient evidence that the horses were in the possession of W when they were stolen, this was sufficient to constitute the crime of larceny. *State v. Stanley*, Western Jurist, June No., 1873, p. 379.

POSSESSION FOR A CERTAIN PURPOSE.

The following instructions were held correct and should have been given: "If any arrangement existed between the defendant and A, that the defendant was to have possession of the horse for trade, and had the right from A to trade the horse, or if the defendant had well founded belief (upon sufficient cause) that he had such right, and that in such belief he sold the horse or traded him off, then he is not guilty of larceny. *State v. Barrackman*, Western Jurist, May No., 1878, p. 314.

POSSESSION OF STOLEN GOODS—PRESUMPTION.

The possession of stolen goods recently after they are stolen is a strong presumption of guilt, and throws upon the defendant the burden of explaining that possession; and, if unexplained, is sufficient to warrant a conviction. 1 Greenl. Ev., Sec. 34; Burrill's Circumstantial Ev., 446; 33 Tex., 480; 21 Gratton Va., 864; *Unger v. State*, 42 Miss., 642; *State v. Turner*, 65 N. C., 592; *Knickerbocker v. People*, 43 N. Y., 117; *State v. Cassidy*, 12 Kan., 559.

Where the evidence on the part of the State tended to show

that the hogs alleged to have been stolen were found in possession of the defendant about December 5, 1875, and the indictment charged the larceny to have been committed November 25, 1875, the principal evidence to sustain a conviction, and on which the prisoner was convicted, was an admission or statement made to a township assessor on an inquiry as to how many hogs the defendant had, to which he replied that all he had was one, over six months old, which statement was made in March or April, 1875. The court say, per Seevers, J.: "Possession of property shortly after the commission of a larceny has been held sufficient to cast on the party in possession the burden of showing that his possession was honestly obtained. But we think no instance can be found in which a possession of property ten months after the larceny, has been held to have this effect. Much less, we think, should such an admission as that made by the defendant in the present case have that effect." *State v. Wallace*, Western Jurist, May No., 1878, page 317.

RECENT POSSESSION—CIRCUMSTANCES.

It is held by the following authorities that the recent possession of stolen property, unaccompanied by other circumstances of guilt, is not sufficient to warrant a conviction. *People v. Chambers*, 18 Cal., 382; *State v. McCormick*, 27 Ib., 404; *Conkwright v. People*, 35 Ill., 204; *State v. McCormick*, 27 Iowa, 126; *Thompson v. People*, 4 Neb., 529. So, where the original possession of a guitar was innocent, and the defendant afterward conceived the purpose of appropriating the property to his own use, he was not guilty of larceny. *State v. Wood*, 46 Iowa, 116. But where it is shown by sufficient evidence that the horses were in the possession of N. when they were stolen, this was sufficient to constitute the crime of larceny. *State v. Stanley*, Western Jurist, June No., 1878, page 379.

RECENT POSSESSION—PRIMA FACIE EVIDENCE.

It seems to be well settled that the recent possession of stolen property, unaccounted for, is a strong presumption, or *prima facie* evidence of guilt. *Warren v. State*, 1 G. Gr., 106; *State v. Taylor*, 25 Iowa, 273; *State v. Brady*, 27 Iowa,

126; *Jones v. People*, 12 Ill., 259; *Commonwealth v. Millard*, 1 Mass., 6; *State v. Walker*, 41 Iowa, 218; *People v. Williams*, 24 Mich., 162; *Thompson v. People*, 4 Neb., 529; 3 Greenl. Ev., Secs. 31, 32, 33. So, where five head of cattle were stolen, and, on the next day three of them were found in the defendant's pens, at his slaughter house, and the carcasses of the other two were found in the slaughter house, it was held that the evidence, *prima facie*, established the fact that the defendant received them, knowing them to have been stolen. *State v. Mayer*, 45 Iowa, 698; *State v. Cassady*, 12 Kan., 550; 1 Am. Cr. R., 567.

POSSESSION—QUESTION OF FACT FOR JURY.

There may be cases where the possession is so long after the commission of the crime, that the court will refuse to submit the question to a jury; but, in most cases, the question is one of fact, to be submitted to a jury. *Rex v. Partridge*, 7 Car. and P., 551; *State v. Bennett*, 3 Brev., 514; *State v. Jones*, 3 Dev. and Bat., 122; *Rex v. Adams*, 3 Pa. and Pa., 600; *Commonwealth v. Montgomery*, 11 Mete., 534; *Engleman v. State*, 2 Ind., 91; *State v. Walker*, 41 Iowa, 218; *State v. Merrick*, 19 Me., 398; *Thompson v. People*, 4 Neb., 529; *State v. Hodge*, 50 N. H., 510; *Reg v. Langmead*, 9 Cox's Cr. Cases, 465; *Remsen v. People*, 43 N. Y., 6; *Stover v. People*, 56 N. Y., 317; 1 Phillips Ev., 634.

POSSESSION—TEMPORARY.

Temporary possession by the thief, though but for a moment, with intent to steal from the owner, is sufficient to constitute larceny. *Rex v. Thompson*, 1 Moody's Crown Cases, 14, 78; 2 Russ. Cr., 153; *Case of Wilkinson*, 1 Leach's Crown Cases, 320; *Com. v. Luckis*, 99 Mass., 431; *Harrison v. People*, 50 N. Y., 520.

PROOF OF HAVING RECEIVED STOLEN GOODS PREVIOUSLY.

Under an indictment for receiving stolen goods, known to have been stolen, evidence that other goods, known to have been stolen, were previously received by the defendant from the same thief is admissible, for the purpose of showing guilty knowledge on the part of the defendant that the goods for receiving which he is charged, were stolen. *King v. Dun*,

1 Moody's Cr. Cases, 146; 3 Metc., Ky., 417; *People v. Rando*, 3 Park Cr. Repts., 335; *Shriedley v. State*, 23 Ohio St., 142; 2 Whart. Cr. Law, Sec. 1689.

SUSPICIOUS CIRCUMSTANCES—PRESUMPTIVE EVIDENCE—INSTRUCTIONS.

Suspicious circumstances may constitute presumptive evidence tending to establish guilt; but it is error to instruct the jury that such circumstances, if unexplained, are sufficient to overcome the presumption of innocence. *State v. Banks*, 43 Iowa, 595.

PROPERTY FOUND AND CONVERTED.

To constitute the finding and conversion of lost property larceny, under the Iowa Code, such finding and conversion must have been by one knowing the owner thereof. Without this knowledge on the part of the finder the offense is incomplete, unless, with slight effort, he might have learned who the real owner was, or have reason to believe who he was. *State v. Taylor*, 25 Iowa, 273; *People v. Swan*, 1 Park Cr. Repts., 10; *People v. McGarren*, 17 Wend., 460; *People v. Anderson*, 14 Johns., 294; 1 Hale P. C., 506; 2 East. P. C., 663; 1 Conn., 296; *Porter v. State*, Martin and Yerger, 226; *Reg v. Knight*, 12 Cox's Cr. Cases, 102; 2 Gr. Cr. Repts., 35; *State v. Levy*, 23 Minn., 104; 23 Am. Repts., 678.

INTENT—CONVERSION.

The intent to steal must exist at the time of the finding of the property, and not at the time of conversion. *Button's Case*, 2 East. P. C., 553; 1 Leach, 411; *People v. Call*, 1 Denio., 120; *Wilson v. People*, 39 N. Y., 459; *People v. Reynolds*, 2 Mich., 422; *Keely v. State*, 14 Ind., 36; *Thompson v. People*, 4 Neb., 528; *Com. v. Titus*, 116 Mass., 42; 1 Am. Cr. R., 416.

ESTRAYS.

The doctrine that, where a defendant finds property of which the owner is unknown, and converts the same to his own use, is not larceny, does not apply to animals straying from their enclosure into a highway, for they may return again. 3 Park Cr. R., 138.

RECEIVING STOLEN GOODS.

The mere receipt of stolen goods, knowing them to be stolen, is not, in itself, a crime; but the receiving stolen goods, knowing them to have been stolen, with a fraudulent intent to deprive the owner thereof, is. 1 Gr. Cr. R., 371; *Rice v. State*, 3 Heiskel, Tenn., 215; 5 Yerg., 154; 4 Ib., 149.

AIDING THIEF.

It is not necessary, in order to convict, to make it appear that the defendant acted from motives of personal gain; but if his object is to aid the thief, it is sufficient. 2 Bishop Cr. Law, Sec. 1092; *Reg. v. Hennessy*, 1 Gr. Cr. R., 372; *State v. Stanly*, Western Jurist, June No., 1878, page 379.

BEING PRESENT WHERE STOLEN PROPERTY IS CONCEALED.

Being present where stolen property is concealed, knowing it to be stolen, and keeping silent, and refusing to give information to officers searching for the same, is, when unexplained, sufficient to warrant a conviction. *State v. St. Clair*, 17 Iowa, 149.

FELONIOUS INTENT.

On a charge of petit larceny before a justice, the information is not defective in not charging that the larceny was committed "feloniously." The words "did steal, take and carry away" being sufficient. *State v. Sipult*, 17 Iowa, 574.

DEFINITION OF.

The term felonious is defined to be an act where there is no color of right or excuse for it. *Regina v. Holloway*, 2 Carr. & K., 942; 1 Gr. Cr. Rep., 348.

ESSENTIAL IN LARCENY.

The taking, in larceny, must be with a felonious intent, to deprive the owner, not temporarily but permanently, of his property. *Johnson v. State*, 36 Tex., 375; 1 Gr. Cr. Rep., 347.

EVIDENCE GENERALLY—RECENT POSSESSION—EXPLANATION.

Where the defendant states that he bought the property which is alleged to be stolen, this does not necessarily constitute such an explanation as to require the state specifically to

disprove it, it being a question for the jury to determine. *State v. Brown*, 25 Iowa, 561.

BURDEN OF PROOF—INSTRUCTIONS.

Where there was no evidence tending to show that the stolen property was found in defendant's possession at any time after the larceny, the court gave the following instructions: "Where property really stolen is found in the possession of any person, the burden of proof is upon such person to show how he came into possession of said property, and unless such person shows that he came honestly into the possession thereof, the law will presume he stole the same," *held*, error. *State v. Thompson*, 45 Iowa, 414.

NON CONSENT.

The non consent need not be proved by the State. *State v. Osborne*, 28 Iowa, 10. Contrary doctrine: *McMahan v. State*, 1 Texas Court of Appeals, 102.

ADMISSIONS OF PRISONER.

The admissions of a prisoner made before the commission of the crime are admissible, and may be shown by the State. *State v. Cruise*, 19 Iowa, 312.

BANK BILLS—IDENTITY—PROOF.

The identity and denomination of bills may be established by circumstances as well as by direct proof. Under New York decisions it was held that at least *prima facie* evidence ought to be given that there are such banks, and of the genuineness of the bills. *State v. Hoppe*, 39 Iowa, 469; *People v. Caryle*, 12 Wend., 547; *Johnson v. People*, 4 Denio, 364; *Low v. People*, 2 Park Cr. R., 37.

ALLEGATIONS—PROOF AS TO OWNER.

Where it is alleged that the property belonged to "A," and the evidence showed the property to belong to "A and B" as partners, it is not a fatal variance. *State v. Cunningham*, 21 Iowa, 433.

CONFESSIONS.

The confession of the defendant as to the commission of the crime is admissible though the prosecutor may have agreed

not to prosecute if he would make a confession, especially when the defendant was advised by the officer that he would not be released. *Morris v. People*, 3 Hill, 395.

ABSENT WITNESS—SECOND TRIAL.

The introduction of the evidence of a witness, taken on a former trial, is not admissible on the second trial, only in case of the death of such witness, and in civil cases. Whether the same is admissible at all in criminal cases, *quere*. *People v. Newman*, 5 Hill, 295. In the cases of 5 Rand., 701, 708, 1 Tenn., 229, it was held inadmissible, even where the witness was dead.

ELEMENTS—MATTER OF DEFENSE.

Where the stolen property is found in the possession of the defendant, it is proper to show the conversation between him and the prosecutor as to a bargain and sale. *Leggett v. State*, 15 O., 283.

Evidence that the party charged with larceny has previously attempted to purchase a chattel similar to that stolen has no tendency to prove theft, and is inadmissible. *Foster v. People*, 18 Mich., 266.

EVIDENCE—VALUE, FAILURE TO PROVE.

Where there is no testimony whatever, showing the value of the property stolen by the accused, other than that with which he stands charged in the indictment, it is not error for the court to refuse to instruct the jury that they cannot add the value of such property to that in the indictment, the court having previously instructed the jury that the ownership of the property stolen must be proved as charged in the indictment. *Geiger v. State*, 6 Nebraska, 545.

DRUNKENNESS AS A DEFENSE.

Though drunkenness cannot of itself constitute an excuse for crime, yet in cases which involve intention as well as acts, as in the crime of theft, it may be proper to hear proof of the drunkenness of the accused at the time of the commission of the act, in order to test his capacity at that time to distinguish between right and wrong. *Ferrell v. State*, 43 Texas, 503; *Carter v. State*, 12 Texas, 500; *Wenz v. State*, 1 Texas

Court of Appeals Reports, 36; *Swan v. State*, 4 Humph., 136; 1 Bishop Cr. Law, Sec. 490; *Pigman v. State*, 14 Ohio, 555; *Laza v. State*, 1 Texas Court of Appeals, 488.

GOOD CHARACTER.

When a criminal intention is of the essence of the offense charged, the accused may, as relevant to the question of his guilt or innocence, put in issue and prove his general good character in that respect, which is impugned by the accusation. *Coffee v. State*, 1 Texas Court of Appeals, R., 548.

WIFE AS WITNESS.

The testimony of a wife in behalf of her husband in a criminal case is to be received, and her credibility is to be tested by the same rules which apply to all other witnesses. *State v. Bernard*, 45 Iowa, 234.

IDENTITY OF PROPERTY.

To sustain a conviction for larceny upon the possession of the stolen property by the defendant, the identity of the property should be satisfactorily established. *State v. Osborne*, 45 Iowa, 425.

DESCRIPTION—EVIDENCE—VARIANCE.

Where the stolen property is particularly described, the proof must correspond with the description, and if not it is fatal. *Alkenbrack v. People*, 1 Denio, 80.

VARIANCE—PLACE.

The place where the property is taken from is not material, so that it is within the county. *People v. Honsyman*, 3 Denio, 121.

LOST NOTE.

Parol evidence is admissible to show the contents and amount of the notes charged to have been stolen, and without accounting for their non production. *People v. Holbrook*, 13 Johnson, 90.

CROSS-EXAMINATION BY DEFENDANT.

It is error to permit the evidence of a witness on his direct examination to go to the jury, where, by reason of sickness, death or otherwise, the defendant had no opportunity of cross-

examining, and that without defendant's fault. *Forrest v. Kissam*, 7 Hill, 463; *People v. Cole*, 43 N. Y., 508.

CHARGE OF CRIME—FAILURE OF DENIAL BY DEFENDANT.

It is proper to show, that after the defendant's arrest, he was charged with the commission of the offense, and made no reply or denial. The effect thereof is to be left to the jury. Wharton, 345; 1 Greenl. Ev., Sec. 215; 3 Hawk., 377; 10 Georgia, 511; *State v. Pratt*, 20 Iowa, 269; *Teachout v. People*, 41 N. Y., 7; *People v. Wentz*, 37 Ib., 303; *People v. Rathbun*, 21 Wendell, 509; *M'Kee v. People*, 36 N. Y., 113; 14 Am. R., 342; *Com. v. Cuffee*, 108 Mass., 285.

BUILDING—STABLE—CONSTRUCTION.

It may be well doubted whether a stable falls under the description of a building, under the statute, "If any person commit larceny in any dwelling house, store, or any public or private building." *State v. Sipult*, 17 Iowa, 575.

COMMON AND NOTORIOUS THIEF.

The Iowa laws do not provide for the indictment of common and notorious thieves, as such, but simply provides for their punishment under an ordinary indictment for larceny. *State v. Riley*, 28 Iowa, 547.

BAR—ACQUITTAL.

Larceny and burglary are distinct felonies of the same grade, and may be joined in the same indictment, but are not subject to the doctrine of merger. *Johnson v. State*, 29 Ala., 62; *Oliver v. State*, 37 Ib., 134; *Hamilton v. State*, 36 Ind., 286; Wharton Cr. Law, Vol. 1, Sec. 564; *Bell v. State*, 2 Gr. Cr. R., 627. Under the Iowa law one cannot be held on a charge of both larceny and burglary in one indictment; it is bad for duplicity. See title, "Burglary," subdivision, "Duplicity."

FINDING OF JURY.

Where the charge was for both larceny and burglary, and the verdict was "guilty of the latter" held to be an acquittal of the larceny. 6 Ala., 493; Ib., 200; 8 Ib., 313; 28 Ib., 72; *Mount v. State*, 14 Ohio, 295; *Williams v. People*, 24 N. Y., 406; 30 Wis., 323; 4 Cal., 376; 25 Miss., 378; 9 Yerger, 333; 1 Bishop Cr. L. (ed. of 1856), Sec. 676; *State v. Ross*, 29 Mo.,

32; *Jones v. State*, 13 Texas, 168; 2 Gr. Cr. R., 627; *Murray v. State*, 48 Ala., 684.

VERDICT—VALUE OF PROPERTY STOLEN.

The verdict of the jury must find the value of the property stolen. *Ray v. State*, 1 G. Greene, 316; *Highland v. People*, 1 Scam. (Ill.), 392; 3 Gilman (Ill.), 53; *State v. Redman*, 17 Iowa, 330; form held sufficient in *State v. Bond*, 8 Iowa, 540; *State v. Wood*, 46 Iowa, 116.

VERDICT—RECEIVING STOLEN GOODS—FORM OF.

"We, the jury, find the defendant guilty of aiding in concealing the stolen property mentioned in the indictment, as charged therein, and assess the value of the same at one thousand dollars," held to be equivalent to a general verdict. *State v. Turner*, 19 Iowa, 144.

EVIDENCE SUFFICIENT TO SUSTAIN VERDICT.

Where one stole a steer which had been placed in the pound, claiming the animal as his own, and showing upon the trial that he had owned one resembling it in appearance, but failing to prove that his animal had strayed away, or that he had made inquiry for it, *held*, that his conduct was inconsistent with a claim of ownership in the property. *State v. Hunt*, 45 Iowa, 673.

LEASING HOUSE FOR PROSTITUTION.

SECTION 4015. If any person let any house, knowing that the lessee intends to use it as a place or resort for the purpose of prostitution or lewdness, or knowingly permit such lessee to use the same for such purpose, he shall be punished by fine not exceeding three hundred dollars, or imprisoned in the county jail not exceeding six months. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA } In District Court of . . . county, . . . term, 1878.
vs. }
. } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of leasing a house for the purpose of prostitution, committed as follows: Said defendant, in the town of . . . , Marion county, and State aforesaid, on the said . . . day of . . . , 1878, did willfully, unlawfully and knowingly let and lease to one J A, a certain dwelling house in said town and county, knowing that the said J A intended to use said house as a place of resort for the purpose of prostitution and lewdness, and that the said building was then and there

so used for the purpose of prostitution and lewdness, contrary to and in violation of law.

Or (did on, etc., as above stated), after having let and leased said house as aforesaid, unlawfully and knowingly permit said lessee to use said house for the purpose of prostitution and lewdness, contrary to and in violation of law.

INDICTMENT—DUPLICITY.

It is not charging two crimes to charge leasing a house, and knowingly permitting a lessee to use a house for prostitution and lewdness. *State v. Abrahams*, 6 Iowa, 119.

ASSENT OF LESSOR.

Mere inaction of a lessor is not sufficient to sustain a conviction. There must be shown a consent. *Abrahams v. The State*, 4 Iowa, 541; *State v. Abrahams*, 6 Iowa, 121.

INSTRUCTION.

A mere failure to interfere or to prosecute, so as to prevent the illegal use, cannot be construed to amount to a permission. *State v. Abrahams*, 6 Iowa, 122.

See, also, title "House of Ill-Fame, Keeping of."

LEWDNESS.

SECTION 4012. If any man or woman not being married to each other lewdly and viciously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness and designedly make any open and indecent or obscene exposure of his or her person, or of the person of another, every such person shall be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding two hundred dollars. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA, } In District Court of . . . county, . . . term, 1878.
vs. } Lewdness.
. } Indictment.

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of lewdness, committed as follows: That the said . . . on or about the . . . day of . . . 1878, in the county of . . . and State of Iowa, and on divers other days and times between said . . . day of . . . aforesaid, and the finding of this indictment the said defendants A B and C D, not being married to each other, did unlawfully, lewdly and viciously associate and cohabit together to the manifest corruption of public morals, and contrary to and in violation of law.

Or, did willfully, unlawfully and designedly make an open, indecent and obscene exposure of his person in a public place, to-wit: [here describe the place], contrary, etc.

Or (using the same caption, etc., as in the last above), an exposure did make of the person of another, to-wit: one . . . , in a public place, etc., contrary, etc.

INDICTMENT.

The indictment should allege that defendants were not married to each other at the time of the commission of the offense. *State v. Clinch*, 8 Iowa, 401.

MUST CHARGE BOTH DEFENDANTS.

The indictment must charge both defendants; one alone cannot be indicted for this crime. Wharton's Cr. Law, Sec. 367; *Delany v. People*, 10 Mich., 241. The Michigan statute under which this decision was made, is the same as the Code, except the word "and" in the place of "or," to-wit: "If any man *or* woman," and "If any man *and* woman," not being married, etc.

ELEMENTS.

To constitute this offense one single act of intercourse is not sufficient; it must be habitual and continuous. *State v. Marvin*, 12 Iowa, 499; *Searls v. People*, 13 Ill., 597.

EVIDENCE.

Showing two acts of private incontinence is insufficient to maintain this charge; it must be an open and notorious dwelling together as if a marriage relation existed. *Commonwealth v. Catlin*, 1 Mass., 9; *Commonwealth v. Calef*, 10 Mass., 153.

DESERTION.

It is competent to show that the defendant deserted his wife and children. *State v. Lyon*, 10 Iowa, 340.

LIBEL.

SECTION 4097. A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends.

SEC. 4098. Every person who makes, composes, dictates, or procures the same to be done; or who willfully publishes or circulates such libel; or in any way knowingly or willfully

aids or assists in making, publishing, or circulating the same, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars.

SEC. 4099. In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury, and if it appear to them that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted.

SEC. 4100. No printing, writing, or other thing, is a libel unless there has been a publication thereof.

SEC. 4101. The delivering, selling, reading, or otherwise communicating a libel; or causing the same to be delivered, sold, read, or otherwise communicated to one or more persons or to the party libeled, is a publication thereof.

SEC. 4102. In all indictments or prosecutions for libel, the jury, after having received the directions of the court, shall have the right to determine at their discretion the law and the fact.

SEC. 4310. An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter upon which the indictment is founded, but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on the trial. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA } In District Court of . . . county . . . term, 1878.
vs. } Libel.
. } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of a malicious libel, committed as follows: That the said . . . , on or about the . . . day of . . . , 187 . . . , in the county of . . . and State of Iowa, contriving unlawfully and maliciously intending to injure and defame the good name and character of one . . . , and to expose him to public hatred and contempt, and deprive him of public confidence and to bring him into public scandal and disgrace, on the said . . . day of . . . , 187 . . . , unlawfully and maliciously did write and publish, and cause and procure to be written and published, a false, scandalous, malicious and defamatory libel in the form of a letter directed to one . . . , containing divers false, scandalous, malicious and defamatory matters and things of and concerning the said . . . , in the matter and effect following: (here set out the letter or written document with the proper innuendoes), the said defendant, . . . , then and there well knowing the said defamatory libel to be false, contrary, etc.

Or, that A B, intending to scandalize, villify, and defame the said . . . , and to bring him into public scandal, infamy, contempt, ridicule, and disgrace, on the said . . . day of . . . , 187 . . . , at and within said county of Linn, unlawfully and maliciously did compose, print and publish, and cause to be composed, printed and published, in a certain public newspaper, called the . . . , a certain false, scandalous, malicious and defamatory libel of and concerning the said . . . in the form of an advertisement, of the tenor and effect following, that is to say: (state the matters alleged to be false), which said scandalous and defamatory libel the said A B, on the said . . . day of . . . , 187 . . . , at, etc., maliciously and unlawfully did distribute and deliver, and cause to be distributed and delivered, to and amongst divers citizens of this State contrary to and in violation of law.

INDICTMENT—SUFFICIENCY OF.

Where the defendant attempts to injure the prosecutor's business by publishing a libel, the indictment should set forth the business that the prosecutor is engaged in. *People v. Jerome*, 1 Mich., 142.

WORDS—CONSTRUCTION OF—EFFECT—TENOR—SUBSTANCE.

An indictment which sets forth the libelous matter to be "in substance as follows" is bad, as the exact words, or libelous matter should be set out. Leading Cr. Cases, Vol. 1, 312; 7 Humph., 63; 6 Rich., 387; 1 Cush., 46; 10 Serg. & Rawle, 173.

EXTRINSIC FACTS.

An indictment for libel must aver any extrinsic fact necessary to show that the words complained of are injurious. 42 Verm., 252; *State v. White*, 6 Ired., 418; *Melton v. State*, 3 Humph., 389.

ELEMENTS.

Slander and libel committed by a written statement to a court, in a pending case which had no reference to the case then pending, is actionable though done by an attorney. *Gilbert v. People*, 1 Denio, 43.

LIBELING JURORS.

It is libelous to publish of one in his capacity as a juror, that he agreed with another juror to stake the decision of the amount of damages to be given in a cause then under consideration upon a game of draughts. 1 Cushing, 46.

CHARGING CRIME.

Though the words impute no punishable crime, yet if they contain that sort of imputation, which calculates to vilify a man, and to bring him into hatred, an indictment will lie. Roscoe's Cr. Ev., 7th ed., page 669.

DEFENSES GENERALLY—JUSTIFICATION—AVERMENT OF TRUTH.

Under section 4099 the truth may be given in evidence, and may be sufficient to acquit.

EVIDENCE OF JUSTIFICATION.

While the truth of the words is no justification in a criminal prosecution for libel, the defendant may show the purpose of the publication, to negative the malice and intent to defame. *Com. v. Clap*, 4 Mass., 163.

TRUTH—EVIDENCE—COMPETENCY.

As to whether the truth can be given in evidence, the court, in case of *People v. Crosswell*, were divided in their opinion. 3 Johnson's Cases, 337; 3 Wheeler's Cr. Cases, 329.

WORDS THAT DO NOT IMPUTE CRIME.

Words or language that do not impute a crime are not libelous. *People v. Jerome*, 1 Mich., 142.

PUBLISHING IN PAMPHLETS.

The publishing in pamphlets obscene language and phrases may be libelous, and is not justified by the defendant's innocent motives or objects, as he must be taken to have intended the natural consequences of his act. *Reg. v. Higlin*, 2 Gr. Cr. Reports, 46.

JUSTIFICATION.

Evidence of other libelous publications by the defendant, of the same general character against the same person, is admissible in evidence for the purpose of proving malice. *State v. Riggs*, 39 Conn., 498; *State v. Riggs*, 1 Gr. Cr. Reports, 558.

INSTRUCTIONS.

It is not proper for the court to instruct whether the publication constitutes a libel, but to instruct what constitutes a libel and let the jury determine whether the defendant is liable or not. 62 Maine, 509; *State v. Goold*, 2 Gr. Cr. Reports, 482; 4 Gray, 546.

JURY TRIAL—WAIVER OF.

While the defendant is entitled to a jury trial, it is nevertheless a right which he can waive. 62 Maine, 509; *State v. Goold*, 2 Gr. Cr. Reports, 482.

LOTTERIES AND SALE OF TICKETS.

SECTION 4043. If any person make, or aid in making or establishing any lottery in this state; or advertise or make public any scheme for any such lottery; or advertise or offer for sale any ticket or part of a ticket in any lottery; or sell, negotiate, dispose of, purchase or receive the same; or have in his possession any ticket or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars, or by both fine and imprisonment at the discretion of the court.

SEC. 28. No lottery shall be authorized by this state; nor shall the sale of lottery tickets be allowed. (Constitution of Iowa.) [Limitation, by section 4168, one year.]

Form of Information.

THE STATE OF IOWA, } Before . . . , a Justice of . . . county.
 VS. }
 } *Information.*

The defendant is accused of the crime of aiding one . . . in the making and establishing a lottery: For that the said . . . , on or about the . . . day of . . . , 187.. in the city of Marion, township of Marion, Linn county, Iowa, did unlawfully aid one . . . in making and establishing a lottery, to be called and known as the . . . lottery, and located at . . . , for the purpose of making lottery tickets, contrary, etc.

Or, did advertise and make public a certain programme for a lottery, to be called the . . . lottery, at . . . , contrary, etc.

Or, did unlawfully sell to one . . . , a certain lottery ticket known as the . . . lottery, and in words and figures following (here describe the ticket), contrary, etc.

Or, did unlawfully sell a certain lottery ticket to one . . . , known as the . . . lottery, which said ticket—the description thereof this affiant is unable to give, not having possession of said ticket—was sold in violation of law.

Or, did unlawfully have in his possession, with intent to sell, ten lottery tickets, known and called the . . . lottery, of the denomination and character following [here copy the tickets], and being in violation of law.

Or, did unlawfully have in his possession, with intent to sell, a certain ticket, as agent of the . . . lottery company, known and called the . . . lottery, which ticket is of the purport and effect following [here describe ticket], contrary to and in violation of law, etc.

The violation of the above section is within the jurisdiction of a justice of the peace, and triable before him as a misdemeanor, and is triable by the district court on appeal only; and from adjudicated cases it would seem that it is not necessary to describe the ticket in an information, yet it is well enough to do so.

INFORMATION—INDICTMENT.

Under section 29, Revised Statutes of New York, which provide “that no person shall vend, sell or barter any ticket,

or part or share of a ticket, or any paper or instrument purporting to be a ticket or part of a ticket of any such lottery, device or game of chance not expressly authorized by law," it was held that the indictment (under our law, information) should describe the lottery as one set on foot for the purpose of disposing of property. A lottery which does not involve the determination of any right to property is not illegal. *People v. Payne*, 3 Denio., 88.

ALLEGATION OF ADVERTISEMENT.

It has been held that in an information for advertising it was not necessary to allege by name, nor was it necessary on the trial to prove what kind of lottery tickets the defendant advertised. *Com. v. Hooper*, 5 Pick., Mass., 42.

NAME OF LOTTERY.

On a charge for selling tickets it was held not to be necessary to give the name of the lottery, nor to set forth the tenor of the ticket. *Com. v. Johnson*, Thatcher Cr. Cases, 284.

ALLEGATION OF CHARACTER AND DESCRIPTION OF TICKETS NOT NECESSARY.

In a state where there is no authorized lotteries [this would apply to Iowa] an indictment would be adjudged sufficient, on demurrer, which merely alleged that the defendant sold a quarter part of a ticket, in a certain lottery, without giving any description whatever, either of the ticket or the lottery, on the ground that there could be no ticket in any lottery which would not be within the prohibition of the statute, and it would be a mere surplusage to describe the ticket or lottery. *State v. Follett*, 6 N. H., 53; *People v. Taylor*, 3 Denio, 99.

PARTICULAR DESCRIPTION DEEMED UNNECESSARY.

It was held on an information for selling tickets, sufficient to allege the name of the lottery, and the place where it was to be drawn, without a further description either as to lottery or tickets. *Cohens v. Virginia*, 6 Wheat., 264.

DESCRIPTION—SUFFICIENCY.

It is held sufficient on an indictment for selling lottery

tickets, to say "a certain lottery ticket," without giving either its tenor or purport. *Freleigh v. State*, 8 Mo., 606.

VALUE OF TICKET—ALLEGATION OF.

It is not necessary to allege the sum or value for which the lottery was made. This is not a case where a certain value is essential to constitute the offense. *Rex v. Forsyth*, Russ & Ryan Cr. Cases, 274. The lottery is alike illegal whether it be made for a great or small amount. *People v. Taylor*, 3 Denio, 96.

NAME OF PURCHASER.

It is not necessary to set out the name of the purchaser of a ticket. *People v. Taylor*, 99.

ADVERTISING IN ONE STATE OF LOTTERY IN ANOTHER STATE.

An indictment is good, though it appears therefrom that the lottery advertised, is to take place in another state than that in which it was advertised. *People v. Charles*, 3 Denio, 212; *People v. Sturdevant*, 23 Wend., 418; *Com. v. Dana*, 2 Metcalf, 329 and 338; *Charles v. People*, 1 N. Y., 180.

EXCEPTIONS—AVERMENT OF.

The sale of lottery tickets being totally prohibited, it is not necessary to allege that the lottery or sale of tickets was not authorized by law. *People v. Sturdevant*, 23 Wend., 417.

DUPPLICITY.

Under a statute which provided that "if any person sell or offer for sale," etc., and where the indictment charged that the defendant "offered for sale and did sell," it was not bad for duplicity, and did not charge two crimes. *Com. v. Eaton*, 15 Pick., 273; *LaBean v. People*, 6 Park., Cr. R., 387.

ELEMENTS.

The advertising of a lottery, or sale of tickets, in a state prohibiting the carrying on of lotteries, or the sale of tickets thereof, is a crime, though the lottery is advertised to be carried on in another state. The mere advertising of one is an offense. *People v. Sturdevant*, 23 Wend., 418; *Com. v.*

Dana, 2 Metcalf, 329 and 338; *People v. Charles*, 3 Denio, 212; *Charles v. People*, 1 N. Y., 180.

DEFINITION.

A lottery is a scheme for the distribution of prizes by chance. Bouvier's Law Dictionary, Vol. 2, p. 86; Webster's Unabridged; *Dunn v. People*, 40 Ill., 465. Drawing prizes and by revolving wheels. 49 Ala., 396; *Randall v. State*, 42 Texas, 580.

CHARACTER OF TICKETS—CONCERTS, ETC.

The Illinois statute in relation to lotteries reads: "If any person shall vend, sell, or otherwise dispose of any lottery ticket in this state, he, she, or they shall be liable to indictment, and on conviction thereof, fined, in a sum not less than one hundred dollars, nor more than five hundred dollars, and shall stand committed until the fine and costs are paid." And on a ticket follows: "Chicago Industrial College and House Festival. This ticket is a receipt for five dollars, in payment for, and delivery of, a steel plate engraving, and admission to our concerts and lectures, for which it is sold. By order of the officers, Thomas & Co., General Agents." The Supreme Court of Illinois held that the ticket alone does not constitute a lottery, for we are not informed by it that there would be any distribution of prizes. When, however, we consider it in connection with the advertisement, we learn that there will be a distribution of engravings, which evidently means a prize, and comes within the provision to make it a lottery, and is in violation of law. 59 Illinois 160; *Thomas v. People*, 2 Gr. Cr. Reports, 551.

INTENTION—DOCUMENTS—ADVERTISEMENTS.

It is proper to introduce as evidence, other tickets sold to different parties, and bills and advertisements of a similar kind, sold by defendant, for the purpose of determining the intent of the defendant. 59 Ill., 160; 2 Gr. Cr. Reports, 551.

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MAKING FALSE ENTRIES AND RETURNS BY OFFICERS.

SECTION 3968. If any public officer fraudulently make or give false entries, or false returns, or false certificates of receipts in cases where entries, returns, certificates, or receipts are authorized by law, he shall be fined not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding one year, or both, at the discretion of the court. [Limitation by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA } In District Court of county, . . . term, 187..
VS. }
. } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of fraudulently making a false certificate, committed as follows: That on the . . . day of . . . , 18 . . . , in Marion township, county and state aforesaid, one H. J. , filed before the said A. B. , who was then and there a duly qualified and acting justice of the peace for said township, an information, charging one S. P. , with the crime of larceny; that afterwards, to-wit: on the . . . day of . . . , 18 . . . , on a trial had before said justice, on said information, said S. P. was adjudged guilty, and, by the said A. B. , fined in the sum of twenty dollars and costs. And whereas it then and there became the duty of said A. B. , justice as aforesaid, to return said fine to the treasurer of Linn county aforesaid, with a certificate to said treasurer of the amount of the fine collected; that the said A. B. did, on the . . . day of . . . , 18 . . . , pay over to said treasurer the sum of ten dollars, as being in full for the fine collected of the said S. P. , with a pretended certificate certifying that he had fined said S. P. in the sum of ten dollars, whereas in fact and in truth said A. B. , justice as aforesaid, had collected and received of said S. P. the sum of twenty dollars; and thereby willfully, unlawfully and knowingly made and returned a false certificate of his doings in said case, contrary to and in violation of law.

RECORDER GIVING FALSE CERTIFICATES.

Where, under an indictment against a Register for making a certificate or abstract of title to lands, which proves to be false, the certificate being signed E. L. , Register; the defendant's defense was that he was not liable, for the reason that the searching of records and furnishing certificates is no part of the duties enjoined on the Register as the duties of said office, and makes the act that of a private individual. The court held: "When an officer, acting in his official capacity and under his official signature, does an act which has relation and refers to matters belonging to his department, and under his particular charge, and he acts, knowingly and designedly falsely, and the act is one calculated to mislead, and one that may be used for the purposes of fraud, it is misconduct in office." *State v. Leach*, 60 Maine 58; 11 Am., R. 172. While it is held by the Supreme Court of Pennsylvania,

in a civil case, that the liability of a recorder of deeds on a false certificate of search only extends to the party taking the certificate, and does not entitle a future purchaser to recover against him. *Commonwealth v. Kellogg*, 5 Am., Law Register, 214.

MALICIOUS MISCHIEF AND TRESPASS ON PROPERTY.

INJURY TO A DAM.

SECTION 3978. If any person maliciously injure or destroy any dam, lock, canal, trench, or reservoir, or any of the appurtenances thereof, or any of the gear or machinery of any mill or manufactory; or maliciously draw off the water from any mill pond, reservoir, canal, or trench; or destroy, injure, or render useless any engine or the apparatus thereto belonging, prepared or kept for the extinguishing of fires, he shall be punished by imprisonment in the county jail not exceeding one year, and by fine not exceeding five hundred dollars.

INJURIES TO BRIDGES, RAILWAYS, AND HIGHWAYS.

SEC. 3979. If any person maliciously injure, remove, or destroy any bridge, rail, or plank road; or place, or cause to be placed, any obstruction on such bridge or road; or willfully obstruct or injure any public road or highway; or maliciously cut, burn, or in any way break down, injure, or destroy any telegraph post, or in any way cut, break, or injure the wires or any apparatus thereto belonging, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail not exceeding one year.

FOR OBSTRUCTING RAILROAD TRACKS.

See title, "Obstructing Railroads." For evidence under a prosecution for violating the above section, see title "Evidence," section 4557.

INJURIES TO BOATS, RAFTS, ETC.

SEC. 3980. If any person maliciously cut away, let loose, injure, or destroy any boom or raft of wood, logs, or other lumber, or any boat or vessel fastened to any place, of which he is not the owner or legal possessor, he shall be punished by fine not exceeding five hundred dollars, and imprisonment in the county jail not more than one year, and shall also forfeit to the use of the person so injured double the amount of dam-

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ages by him thereby sustained, to be recovered in an action at law.

INJURIES TO MONUMENTS, GUIDE BOARDS, ETC.

SEC. 3982. If any person maliciously take down, injure, or remove any monument erected on any tree marked as a boundary of any tract of land, city, or town lot; or destroy, deface, or alter the marks of any such monument or tree made for the purpose of designating such boundary, or injure or deface any mile stone, post, or guide board erected on any public way; or remove, deface, or injure any sign board; or break or remove any lamp or lamp post, or extinguish any lamp on any bridge, way, street, or passage, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court.

TRESPASS BY CUTTING TIMBER AND REMOVING EARTH.

SEC. 3983. If any person willfully commit any trespass by cutting down or destroying any timber or wood standing or growing on the land of another; or by carrying away timber or wood being on such land; or by digging or carrying away any earth, stone, marble, slate, coal, copper, lead, iron ore, or any other ore or metal; or by taking and carrying from such land any grass, hay, corn, grain, fruit, or other vegetables; or carrying away from any wharf, street, or landing place, any goods whatever in which he has no interest, he shall be punished by fine not exceeding five hundred dollars, or imprisonment in the county jail not more than one year, or by both fine and imprisonment at the discretion of the court. If in any case the value of the property so cut down, carried away, or otherwise taken shall not exceed the sum of fifty dollars, then the person so offending shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days.

INJURIES TO GARDENS, AND IMPROVED LANDS.

SEC. 3984. If any person willfully commit any trespass by entering upon the garden, orchard, or improved land of another, with intent to take, carry away, destroy, or injure the trees, shrubs, grain, grass, hay, fruit, or vegetables there being, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not more than thirty days.

The same form for an information may be used, with slight modifications as under section 3897, *ante*, title "Stealing and Injuring Fruit."

DEFACING AND INJURING BUILDINGS, ETC.

SEC. 3985. If any person maliciously injure, deface, or destroy any building, or fixture attached thereto, or willfully and maliciously destroy, injure, or secrete any goods, chattels, or valuable papers of another, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, and is liable to the party injured in a sum equal to three times the value of the property so destroyed or injured in a civil action.

DEFACING PUBLIC BUILDINGS.

SEC. 3986. If any person willfully write, make marks, or draw characters on the walls or any other part of any church, college, academy, school house, court house, or other public building; or willfully injure or deface the same, or any wall or fence enclosing the same, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not more than thirty days.

DEFACING AND DESTROYING PROCLAMATIONS, NOTICES, ETC.

SEC. 3987. If any person intentionally deface, obliterate, tear down, or destroy in whole or in part, any transcript, or extract from or of any law of the United States, or of this state, or any proclamation, advertisement, or notification set up at any place within this state by authority of law or by order of any court, during the time for which the same is to remain set up, he shall be fined in a sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days.

TAKING PROPERTY FROM BOATS AND VESSELS.

SEC. 3988. If any owner, master, clerk, or any other person having charge of or belonging to any boat, vessel, or raft, take any cord wood or any other species of property from the owner or his agent, without the knowledge of such owner or agent, or without paying the customary price for the same, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months.

INJURIES TO MONUMENTS OF STATE BOUNDARY.

SEC. 3989. If any person willfully dig up, pull down, break, or destroy, or in any other manner injure or remove any of the cast iron pillars or other evidences planted and fixed, or which may hereafter be planted or fixed, in and along any part of the boundaries of this state, he may be indicted therefor, and, upon conviction before any court having competent jurisdiction, shall be punished by fine not less than fifty dollars nor more than two hundred dollars, or by imprisonment in the

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penitentiary for a term not less than six months, or by both such fine and imprisonment at the discretion of the court.

BREAKING LEVEES.

SEC. 3991. If any person maliciously injure, break, or cause to be broken, any levee erected to prevent the overflow of land within this state, such person so offending shall, upon conviction, be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

OBSTRUCTING PUBLIC DITCHES AND DRAINS.

SEC. 3992. If any person place any obstruction in any of the public ditches or drains made for the purpose of draining any of the swamp lands in this state, he shall, upon conviction, be compelled to remove said obstructions and be fined not less than five dollars nor more than one hundred dollars, or be imprisoned in the county jail not more than thirty days at the discretion of the court.

LAWS OF 1874, CHAPTER 17, PAGE 14.

That chapter 7 of title 24 of the Code be and the same is hereby amended by adding thereto the following section, to-wit: "If any person, without authority or permission from the proper road supervisor, shall in any manner obstruct, deface, or injure any public road or highway, by breaking up, plowing or digging within the boundary lines thereof, he shall, upon conviction, be punished by a fine of not less than five dollars nor more than twenty-five dollars, or by imprisonment in the county jail not more than thirty days at the discretion of the court."

Limitations, under sections 3978, 3979, 3980, 3982, 3985, 3988, 3989, 3991, and under 3983, if the value of the property taken or injured exceeds fifty dollars, is three years, by section 4167; and for sections 3984, 3986, 3987, 3992, and 3983, if the property under this section does not exceed fifty dollars, the limitation is, by section 4168, one year.

Form of Indictment for Section 3978.

THE STATE OF IOWA	}	District Court of the county of term, 1878.
vs.		
.	}	<i>Indictment.</i>
.		

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of willful and malicious mischief, committed as follows: That the said . . . , on the . . . day of . . . , 187 . . . , in the county of

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. . . , and State of Iowa, did willfully and maliciously injure a certain mill-dam, then and there being over and across Indian creek, known as and called "Gifford's Dam," and the property of one George Gifford, by then and there willfully and maliciously cutting and tearing out the flood gate of said dam contrary to and in violation of law, and against the peace, etc.

Form of Indictment under Section 3979.

THE STATE OF IOWA } District Court of the county of . . . , . . . term, 1878.
vs. } Obstructing a Railroad.
. } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of willful and malicious mischief, committed as follows: That the said . . . , on the . . . day of . . . , 187 . . . , in the county of . . . , and State of Iowa, did willfully, maliciously and feloniously, in and upon the track of a certain railroad then and there being and operating, and known as the "Dubuque and Southwestern" railroad, put and place an obstruction, to-wit: a piece of solid wood and timber of the length of eight feet, of the breadth of eight inches, and of the thickness of six inches [with the intent then and there and thereby to obstruct the passage of the locomotive and train of cars next then and there to come upon said track, and to throw them off said track, against, etc.], and did then and there, by the unlawful acts and obstruction aforesaid, cause the locomotive and two cars of the train of cars next then and there coming upon said track, to be actually thrown off said track, contrary to and in violation of law.

The words inclosed in brackets are not to be used unless the indictment is for "Obstructing with intent," etc.

For injuring a bridge: . . . did, at the county and state aforesaid, on the . . . day of . . . , 1877, willfully, maliciously and unlawfully break down and damage a certain bridge there situated, by then and there tearing up the boards and floor of said bridge, known and called "Silver creek bridge," then and there rendering said bridge dangerous and impassable, contrary to and in violation of law.

Or, . . . did, willfully and unlawfully, obstruct a certain bridge then and there situated in said county and state, by then and there nailing pieces of timber across said bridge, known and called "Silver creek bridge," making said bridge entirely impassable, contrary to and in violation of law.

Obstructing highway: . . . did, on the . . . day of . . . , 187 . . . , in the county and state aforesaid, willfully and maliciously obstruct a certain public highway at and near Gold creek bridge, said highway leading from Marion aforesaid to Cedar Rapids, in said county, by then and there building and erecting a fence on and across said highway, thereby entirely obstructing the free use of said highway, contrary to and in violation of law.

Form of Indictment under Section 3980.

THE STATE OF IOWA } District Court of the county of . . . , . . . term, 1878.
vs. } *Indictment.*
. }

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse A B of the crime of willful and malicious mischief, committed as follows: That the said A B, on the . . . day of . . . , 187 . . . , in the county of . . . , and State of Iowa, did willfully, unlawfully and maliciously cut away and let loose a certain boat, known and designated as the "Double-six," then and there being in Indian creek and fastened to a stake on the bank of said creek, he, the said A B, not being the owner thereof, contrary to and in violation of law.

Form of Indictment under Section 3982.

THE STATE OF IOWA } District Court of the county of . . . , . . . term, 1878.
vs. } *Indictment.*
. }

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of willful and malicious mischief, committed as follows: That the said . . . , on the . . . day of . . . , 187 . . . , in the county of . . . , and State of Iowa, did unlawfully, willfully and maliciously break, remove and destroy a certain guide board, on a certain public highway then and there situated, and leading from Marion to Cedar Rapids in said county, and known as the

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"Marion and Cedar Rapids Boulevard," said guide board being then and there set up and erected by authority of law, by the proper road overseer of the road district in which the same was situated, for the purpose of public information and benefit contrary to and in violation of law.

Or, . . . did unlawfully, willfully and maliciously tear down, remove and destroy a certain sign board, then and there being on and over a certain grocery store in said city of Marion, known as "A. K. Davis & Co's" store, said sign board bearing the inscription of "Groceries and Queensware," contrary to and in violation of law

Form of Indictment under Section 3983.

THE STATE OF IOWA } District Court of the county of . . . , . . . term, 1878
vs. }
. } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of willful and malicious mischief, committed as follows: That the said . . . on the . . . day of . . . , 187. . . , in the county of . . . and State of Iowa, did unlawfully, willfully and maliciously cut down and destroy six certain trees, then and there standing and growing on the land of one A B, in said county, and state aforesaid, to-wit the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ section, etc. and being then and there the property of said A B, and of the value of . . . dollars, contrary to and in violation of law.

Similar forms will do for all the violations in said sections named, with a slight change. *State v. Watrous*, 13 Iowa, 490.

Or, under section 3985, for *Injuries to buildings*:

. . . did, on the . . . day of . . . , 1877, at the county and state aforesaid willfully, unlawfully and maliciously injure a certain dwelling house then and there situated in said county and state, the property of A V, break and injure by throwing stones at and against the windows and doors of said dwelling house, and then and there breaking and demolishing the windows of said house, contrary to and in violation of law.

Or, under section 3986, for *Defacing public buildings*:

. . . did, on etc., willfully, maliciously and unlawfully injure and deface a certain public building, to-wit: the court house, then and there situated at Marion town ship, Marion county, and state aforesaid, by then and there, with stones, sticks, and other missiles, throw at, against and into said building, thereby breaking and destroying the windows of said building, the same being a public building, to-wit: court house, then being used for public purposes, contrary to and in violation of law.

Form of indictment under section 3987, for *Tearing down public notice*:

. . . did, intentionally, unlawfully and injuriously tear down, deface and destroy a certain notice, part printed and part written, of the sale of certain real estate, set up and posted on a certain blacksmith shop in the town of Marion, county and state aforesaid, by the sheriff of said county, by authority of law, before the expiration of the time for which the said notice had been set up, and by law was to remain posted up, contrary to and in violation of law.

Under section 3988, for *Taking property from a boat*:

. . . did, on the . . . day of . . . , at Marion, in the county and state aforesaid, he, the said J. W., then and there having charge of a certain boat, known as the "Double-six," as clerk of said boat, then and there owned by one H, unlawfully, willfully, and without the knowledge of said owner, take from said boat, the same being then and there at Gifford's landing, in said county and state, one keg of beer, containing eight gallons, and of the value of six dollars, said keg of beer having been placed in the charge of said H, owner as aforesaid, by L O and B B, and dressed and to be shipped to one S P, at McCurdy's Springs, in said county and state, which acts were done contrary to and in violation of law.

Under section 3989, for *Injuries to monuments of state boundary*:

. . . did, unlawfully, willfully and maliciously take up, remove and carry away certain cast iron post or monument, then and there erected and set in the earth for the purpose of marking and designating the state line between the states of Iowa and Missouri, the same having been placed and set up by authority of law, against the peace and dignity of the state, and contrary to and in violation of law.

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Under section 3991, for *Breaking levees*:

. . . did, on the . . . day of . . . , 1877, maliciously injure a certain levee erected on Indian creek, at West Maine street, within the city of Marion, said county and state, by then and there willfully and maliciously cutting off the posts set along the line of said street, to which plank and other material are fastened, and said levee being erected to prevent the overflow of land within this state, said acts being done contrary to and in violation of law.

Under section 3992, a similar form may be used to the one used for obstructing roads.

There is no precise line by which indictments for malicious mischief are separated from actions of trespass. It cannot be expected that the mere liability to damages will operate on a mind so depraved. The injury may be committed when none but the person injured is a witness. The perpetrator may be insolvent, and thus gratify his malice with impunity, if there is no redress otherwise than by civil action. This would be contrary to the policy of every well regulated government, which is to protect the citizen in his right by restraining and punishing the wrong doer. The offense is distinguishable from an ordinary trespass in this: that it is not only a violation of private right, without color or pretence, but without hope or expectation of gain. Such an act discovers a degree of moral turpitude dangerous to society, and for their security ought to be punished criminally, inasmuch as the act is an outrage upon the principles and feelings of humanity.

INDICTMENT—CUTTING AND DESTROYING TIMBER.

Where an indictment charged: "did on and at, etc., unlawfully and willfully cut down and destroy timber and wood standing and growing on the land of one W C, to-wit: the NE $\frac{1}{4}$, etc.," it is not necessary to more particularly state the specific injury to the property. When it is alleged that the timber was cut down and destroyed, the sum of all other injuries thereto is included. *State v. Watrous*, 13 Iowa, 490; *State v. Merrill*, 3 Blackf., 354.

VALUE OF TIMBER DESTROYED.

Under the Iowa Code it is not necessary to allege the value of the timber destroyed, while by the Indiana statute, under which the *State v. Pendon*, 2 Blackf., 371, was decided, the punishment is fixed at a sum not exceeding twofold the value of the property destroyed, and hence the necessity of averring the value in the indictment. *State v. Watrous*, 13 Iowa, 490.

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OWNER'S NAME SHOULD BE ALLEGED.

The name of the owner of the land upon which the alleged trespass was committed should always be given. *State v. McConkey*, 20 Iowa, 575; *Davis v. Commonwealth*, 30 Penn., 421; *People v. Horr*, 7 Barb 9; 13 Ired, 341; *People v. Carpenter*, 5 Park, Cr. R., 228; *State v. Brandt*, 41 Iowa, on page 608; *Read v. State*, 1 Ind., 511; *State v. Jackson*, 7 Ind., 270. To allege the same to be in the United States is sufficient. *State v. Herrold*, 9 Kansas, 194.

PREMISES—DESCRIPTION OF.

Under the New York statute, which provides that "every person who shall willfully commit any trespass by cutting down or destroying any kind of wood or timber standing or growing upon the lands of any other, or upon lands belonging to the people of this state, etc.," which is in substance the same as the Iowa Code, it is held to be necessary to describe the lot and premises on which the trespass was committed. *People v. Carpenger*, 5 Park. Cr. R., 228.

DUPPLICITY.

An indictment charging that the defendant "unlawfully, etc., destroyed and caused to be destroyed," does not charge two offenses. *State v. Kuns*, 5 Blackf., 314; 8 Blackf., 315.

SPECIFIC ALLEGATION OF INJURY.

An indictment for malicious mischief must show the specific injury done to the property. *State v. Aydelott*, 7 Blackf., 157.

INJURIES TO A CHURCH.

Where an indictment alleged that the defendant did "willfully and maliciously injure and deface a certain church building, commonly called a church, of the value of one thousand dollars, etc., the property of J. L., S. M., and O. G., as elders of the church of God, to the great damage of the said J. L., etc., as such elders, by breaking in the windows of said church building, and splitting and breaking the doors of the same, contrary, etc.," it was held to be good, and to allege that the property is in said officers is sufficient, without setting out the character of the title or interest. *State v. Brant*, 14 Iowa, 180.

ELEMENTS.

A charge of cutting down and conveying away the timber of standing and growing trees upon the land of another, is not sustained by evidence showing that the defendant carried away timber or wood being on such land. *State v. McConkey*, 20 Iowa, 574.

INJURIES TO PERSONAL PROPERTY—HARNESS.

Where a defendant was charged to have maliciously injured a harness, the property of another, it was held to be a crime, under the common law, there being no statutory provisions, and that he was criminally liable. *People v. Moody*, 5 Park. Cr. R., 568. So the malicious breaking a cutter is held to be a criminal offense. *Loomis v. Edgerton*, 19 Wendell, 419; 5 Park. Cr. R., 568.

MUST BE TO THE INJURY OF ANOTHER.

A malicious act, however wanton or dangerous, which does not result in injury to property, does not amount to malicious mischief. *Wait v. Green*, 5 Park. Cr. R., 185. So a trespass upon property, though willful and malicious, does not constitute the offence of malicious mischief, at common law, unless committed in the night time, or secretly, without the hope of gain; or unless it consist of some act of cruelty to domestic animals. *Williams v. People*, 24 How. Pr., 350.

GIRDLING TREES.

On a charge of girdling fruit trees, described as the property of A, it is sufficient proof of ownership to show that A was in possession and occupation of the premises at the time of committing the offence. *People v. Horr*, 7 Barb., 9.

MALICIOUS—WILLFUL.

The act must be willful and malicious. The allegation, "malicious," is construed to mean the doing of the act out of a spirit of cruelty, hostility or revenge. This element must exist in all those injuries to real or personal property. In this case the charge was, "defacing a building." *Commonwealth v. Williams*, 110 Mass., 401; 2 Green Cr. R., 265; *Commonwealth v. Walden*, 3 Cushing, 558, 561.

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MALICE.

Malice may be inferred from the act, or manner of committing the act, or by its repetition; but the relation existing between the defendant and the family in which he lived, and a third person, is immaterial. *State v. Dermott*, 36 Iowa, 107.

ICE IN STREAMS—REMOVAL OF.

Under an Indiana statute similar to section 3983, Code 1873, it is trespass to cut and remove ice from the land of another, as much so as if it were earth, and is a criminal offense. *State v. Pottmyer*, 33 Ind., 402; 5 Am. R., 224.

EVIDENCE—ADMISSIONS.

In the trial of an indictment for malicious mischief, committed on property owned by one M., it was held that evidence showing that said M. admitted that the property belonged to one of the defendants, when not offered for the purpose of contradicting said M., or in connection with evidence showing that defendant had knowledge of such admission, was immaterial and inadmissible. *State v. Delong*, 12 Iowa, 454.

OWNERSHIP IN TRUSTEES—HOW PROVEN.

Where the charge was of defacing a church, and the ownership alleged to be in certain trustees or elders of such church organization, it is proper to show the ownership by their election according to the forms and usages of the society. *State v. Brandt*, 14 Iowa, 180.

DEFENSE—MALICIOUS INTENT.

When it appeared that parties were fighting or quarreling, and one threw a stone at another, and the stone struck a house or window, instead of the party intended to be struck, it was held that a conviction could not be sustained for malicious mischief to the building, there being no intent. *Rex v. Pemberton*, 12 Cox's Criminal Cases, 607; L. R. 2 C. C., 119; 2 Green Cr. R., 19.

JUSTIFICATION.

Where one has for a long time been in the habit of using a way across the land of another, and he believes, in good faith, that he has a right to use it, he will not be guilty of malicious trespass for removing a fence placed across such way. *Palmer*

v. State, 45 Ind., 388; 2 Green Cr. R., 718. Nor for cutting timber where the defendant has possession under a contract of purchase. *Howe v. State*, 10 Ind., 492. To the same effect is *Windsor v. State*, 13 Ind., 375; *Goforth v. State*, 8 Humph., 37; *Dye v. Commonwealth*, 7 Gratt., Va., 662; 2 Green Cr. R., 720; or where the act was done in the exercise of an avowed legal right. *State v. Flynn*, 28 Iowa, 26.

JOINT AND SEPARATE TRIAL.

Where the defendants were jointly indicted for a misdemeanor, it was a discretionary power of the court as to whether they should be tried jointly or not. *State v. Gigher*, 23 Iowa, 318.

VERDICT—VALUE.

In cases of malicious mischief it is not necessary to find the value in the verdict. *State v. Gigher*, 23 Iowa, 318.

HIGHWAYS—OBSTRUCTION OF.

Under Section 4089, Code 1873, title, "Nuisance and Abatement Thereof," the obstructing or incumbering by fences, building, or otherwise, the public highways, private ways, streets, alleys, commons, landing places or burying grounds, are nuisances, and indictable as such.

INDICTMENT—WILLFUL, UNLAWFUL.

Where the indictment charged "that the defendant willfully obstructed the public road, etc.," this averment is sufficient as having been done "unlawfully." *Capps v. State*, 4 Iowa, 503.

LOCATION AND DESCRIPTION OF ROAD.

Under the Ohio law of 1857, which is in substance the same as that in Iowa above cited as section 4089, "the obstructing or incumbering by fences, buildings, structures or otherwise, any of the public highways, or streets or alleys of any city or village, shall be deemed nuisances." Laws of 1857, section 2, Ohio law. Under this law the indictment charged: "A certain county road, lawfully and regularly established, laid out, opened, worked, and used as a public highway by the citizens of the State of Ohio, and which said public highway is situate in the township of Jackson, in said county of Ashland, and

State of Ohio," sufficiently describes the road, and need not describe the particular place of the alleged obstruction, not being a necessary ingredient of the offense; nor that the public passing or repassing was actually hindered. This may have been required under the common law, but is not under the above statute law. *Matthews and Buzzard v. State*, 25 Ohio St., 536. It was contended that a particular description in the indictment was necessary, so that if an order is made by the court to remove the nuisance, it was essential to direct the officer to remove it, and hence the place of obstruction must be set out. This theory was held to be good in *Wood v. State*, 5 Ind., 433; *Cox v. State*, 3 Blackf., 193. This, however, is not the case under the Ohio law, as, under that law, an order to remove or abate a nuisance will not be issued as a matter of course; but on hearing of a motion for such order, either party will be heard upon testimony, after conviction, and if it then appears that such nuisance has ceased to exist, the order should not issue. So that an order of removal does not have to be a part of the sentence on a conviction. The same applies to sections 4092, 4093, Iowa Code, title "Nuisance." *Smith v. State*, 22 Ohio St., 539; 25 Ohio Stat., on page 541.

FORCE AND ARMS.

The indictment need not allege the obstructions to have been done with *force and arms*. *Commonwealth v. Gowen*, 7 Mass., 378.

ELEMENTS—NUISANCE.

Section 26, Chapter 154, Laws of 1858, as incorporated in the Rev., 1860, and now in Section 993, Code 1873, which enacts that "The supervisor shall remove obstructions in the highways caused by fences or otherwise, etc.," does not repeal the section in the chapter on nuisances, providing for the punishment for the obstruction of a highway, and declaring the same to be a nuisance. *State v. Berry*, 12 Iowa, 58.

ROAD PETITION—NOTICE—JURISDICTION OF INFERIOR TRIBUNAL.

Where the proceedings to establish highways are within the jurisdiction of county commissioners, board of supervisors, or inferior tribunals, it is well settled that where such inferior tribunal has exclusive jurisdiction over any subject, expressly

conferred by the legislature, and where it has acquired jurisdiction over such subject matter in the manner prescribed by law, that every presumption thereafter is in favor of the legality of its proceedings, and that any objections to the irregularity of its action cannot be raised collaterally, but must be upon appeal or *certiorari*. Where, however, the record shows, as in this case, that such court never acquired jurisdiction, no presumptions obtain in its favor. *State v. Berry*, 12 Iowa, on page 60.

LEGALITY OF PROCEEDINGS—POWER OF VIEWER.

A commissioner appointed to survey and lay out a highway has no power to extend the same beyond the terminus named in the notice and petition, and a report establishing such extension, though approved by the county judge, now "supervisor," is null and void. *State v. Mobly*, 18 Iowa, 525.

ILLEGALITY—POWER OF CLERK.

The clerk of the board of supervisors has no authority to appoint a commissioner to view a road, but the board may confer the power on the clerk to fix a day when the commissioners shall act. *State v. Kimball*, 23 Iowa, 531.

FINAL ESTABLISHMENT.

As the final establishment of a road involves important questions of private right and public good, it is doubtful whether it was intended that the board should in any case abdicate its functions, or transfer their exercise in this respect to the clerk. *State v. Kimball*, 23 Iowa, 531.

HIGHWAY BY PRESCRIPTION.

To constitute a highway by prescription, based upon use by the public for the length of time, with the knowledge and consent of the owner of the soil, there must be an absence of proof that the road was so used by leave, favor or mistake. If it be shown that the apparent consent of the owner was based upon the mutual mistake of himself and the public as to the location of the section line along which it was intended the road should run, no highway by prescription will be gained there, and the owner may insist upon the road being straightened or changed to the line intended. *State v. Crew*, 30 Iowa 258.

A highway which is opened and used with the assent or

acquiescence of the owner, will be presumed to have been intentionally dedicated by him to the use of the public, but his assent will be presumed only when he is aware of the use of his property by the public, or when facts will justify the presumption that he is aware of its use. The use of wild and uninclosed lands, timber or prairie land, by the public as a highway, will not raise a legal presumption that the owner had notice of the use of the land for such purpose. *State v. K. C., St. J. and C., B. R. Co.*, 45 Iowa, 139. In support of the proposition that the use of wild or timber lands by the public will not raise a presumption that the owner had notice of its use for such purpose, the following authorities are cited: *Warner v. President of the Town of Jacksonville*, 15 Ill., 237; *Watt v. Trapp*, 2 Rich., 136; *Harding v. Jasper*, 14 Cal., 642; *Hutlo v. Tindall*, 6 Rich., 396; *Hogg v. Gill*, 1 Mc. M., 329; *Scott v. State*, 1 Sund., 629; *Hewins v. Smith*, 11 Mete., 241; *Gibson v. Durham*, 3 Rich., 136; *Com. v. Kelly*, 8 Gratt., 632; *Bethun v. Turner*, 1 Greenleaf, 111; *Stacy v. Miller*, 14 Mo., 478; 45 Iowa, on page 144.

WIDTH OF HIGHWAY.

A prosecution may be supported for obstructing a highway, established by user or prescription, which is of less width than a county or state road established in the manner pointed out by the statute. *State v. Robinson*, 28 Iowa, 514.

LESS WIDTH THAN LAW PROVIDES.

Where a commissioner, to view a road, made the following report: "Whole length of the road three miles—road thirty-three feet wide," and the county court made an order: "Whereupon the commissioner, heretofore appointed in this case, has reported in favor of said road, and the court finding said road necessary, ordered it to be opened and made," *held*, the road was established thirty-three feet wide, and the defendant was not guilty of obstructing the highway, who erected his fence in accordance with this width of the road instead of sixty-six feet. *State v. Schlib*, *Western Jurist*, May No., 1878, page 310.

NOTICE TO REMOVE FENCES—AFTER AN ORDER.

To render a person, over whose land an order was made that

a road be established when all legal claims for damages were paid, liable to prosecutions for obstructing a highway by permitting his fences to remain as they were before such order, he must have had notice to remove his fence, or that the road was fully established in accordance with the order. *State v. Ratliff*, 32 Iowa, 189.

ADVERSE POSSESSION.

While the public may acquire the right to a highway by virtue of adverse possession and use, under claims of right for the statutory period, the same as an individual, the possession or use must, nevertheless, correspond and be commensurate with the claims of right. *State v. Welpton*, 34 Iowa, 144.

ESTABLISHED ON CERTAIN LINE.

Where a highway is established upon a certain line, the law will not presume a grant or prescription of land outside of such line because of the public use thereof, growing out of a slight and mistaken variance between such use and the true line. *State v. Welpton*, 34 Iowa, 144. The law will not presume a grant, or support a prescription on account of a slight and mistaken variance between the use and the line. *Atkins v. Bordman*, 20 Pick., 291; 2 Metc. 457; *Comegys v. Carley*, 3 Watts, 280; *Gray v. McCreary*, 4 Yates, 494; *State v. Crow*, 30 Iowa, 258.

ESTABLISHMENT BY PRESCRIPTION.

To establish a highway by prescription there must have been a general uninterrupted use of the same as such by the public, under a claim of right, for a period equal to that for the limitation of real actions. *Keyes & Crawford v. Tait*, 19 Iowa, 123; *State v. Tucker*, 36 Iowa, 485.

BY DEDICATION.

To establish a highway by dedication by the owner to the public, an acceptance must be shown; dedication as a private way, or any length of user as such, will not be sufficient. *Onstott v. Murray*, 22 Iowa, 457; *Wilson v. Sexon*, 27 Iowa, 15; *Manderschid v. The City of Dubuque*, 29 Iowa, 73; *State v. Tucker*, 36 Iowa, 485. To constitute a dedication there must be an actual public use, general, uninterrupted and

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continued for ten years, under a claim of right. *State v. Greene*, 41 Iowa, 693.

TOWNS AND CITIES.

The law, in relation to obstructing a highway, applies to towns and cities as well. *Commonwealth v. Gowen*, 7 Mass., 378.

NATURAL OBSTACLES—NON-USER BY PUBLIC.

To constitute a highway, the right to appropriate land for the purpose is not alone necessary, it must in addition be made capable of use, and to obstruct a highway which cannot be used by the public is no crime. *State v. Shinkle*, 40 Iowa, 131. But where part is so obstructed, and part can be used, it is an offense to obstruct that portion which is used. *State v. McGee*, 40 Iowa, 595.

DISPUTED LINES.

Where the precise location is in question, it is error to instruct the jury respecting the manner of acquiring a highway by prescription and dedication; these questions have nothing to do with the question as to lines. *State v. Gould*, 40 Iowa, 372.

MALICE.

Malice is not an element in this offense for obstructing a highway. *State v. Gould*, 40 Iowa, 374.

PAYMENT OF COSTS—CONDITION.

To render a person liable, where the road is established, on payment of costs, within a certain time, it must appear that the condition had been performed within that time. *State v. Glass*, 42 Iowa, 56. So, on condition of payment of damages and no date of payment, it then will be presumed to have been paid when it was required. *State v. Prine*, 25 Iowa, 232.

PUBLIC AND PRIVATE RIGHTS.

To make the obstructions of a public way an indictable offense, it must injuriously affect some right in which the public, in their aggregate capacity, have a common interest, as distinguished from a mere individual, or private right. *People v. Jackson*, 7 Mich., 432.

JURISDICTION—NOTICE OF PETITION.

Notice must be given of the pendency of an application for the establishment of a road, to confer jurisdiction upon the supervisors, and unless it appear to have been given, jurisdiction will not be presumed. *State v. Berry*, 12 Iowa, 58; *State v. Anderson*, 39 Iowa, 274. Jurisdiction will, however, be presumed if it be shown from the record that the court establishing the road decided that sufficient notice had been given. *Mc Collister v. Shuey et al.*, 24 Iowa, 362. And if the record shows that notices were posted, it will be presumed that parol proof was introduced to show they were put up in the manner required by law. *Woolsey v. Supervisors of Hamilton Co.*, 32 Iowa, 130. Extrinsic proof is admissible upon the introduction of the record to show notice. Upon such proof the court will infer that the notices were given, but had been lost from the files. *Keyes & Crawford v. Tait*, 19 Iowa, 123; *State v. Anderson*, 39 Iowa, 275.

BOARD—AUDITOR—POWER TO ESTABLISH ROAD.

The board of supervisors alone have the power to order a road, and an auditor has no jurisdiction in such a case to order it or forbid it. *State v. Wagner*, May No., Western Jurist, page 296.

EVIDENCE—RECORD—WHAT MUST APPEAR.

When a petition and notice are necessary to confer upon an inferior tribunal jurisdiction of the subject matter, the record must show that a petition and notice were filed to raise such presumption in favor of the regularity of its proceedings. *State v. Berry*, 12 Iowa, 58; *State v. Anderson*, 39 Iowa, 275.

COUNTY ROAD—HIGHWAY—DISTINCTION.

Under an indictment for obstructing a certain county road, evidence to show a highway by use or prescription, is not admissible. "Highway" implies a road laid off and established under and in the manner provided by the statute. *State v. Snyder*, 25 Iowa, 208; *Dimon v. People*, 17 Ill., 416.

RECORD—STARTING POINT AND TERMINUS.

A record of establishment of a county road, which fails to

show with any certainty the starting point or terminus of the road, is objectionable for uncertainty in a prosecution for obstructing a county road. *State v. Snyder*, 25 Iowa, 208.

DISCREPANCIES IN DESCRIPTION.

In a description of distances between certain points on the line of a road, which are evidently the result of clerical mistake, and which may be corrected by reference to other parts of the record, will not render the location of the road void for uncertainty. *State v. Prine*, 25 Iowa, 232.

RECORDS, SUFFICIENCY OF.

Whether the records and papers which are offered in evidence to show a legal establishment of a road are sufficient, is a question of law for the court, and not of fact for the jury. *State v. Prine*, 25 Iowa, 232.

IDENTIFICATION OF PLAT.

Although the plat of a road is not referred to or identified in the report of the commissioner, yet it is sufficient if it is referred to in the records of adjudication. *State v. Prine*, 25 Iowa, 232.

PRODUCTION OF PETITION AND NOTICE.

That a petition for a road is not produced, nor offered in evidence in a prosecution for obstructing a highway, constitutes no valid objection to the admission of the road record, when it appears therefrom that the petition was presented, filed and acted upon. *State v. Lane*, 26 Iowa, 223.

STATE NOT CONFINED TO DOCUMENTARY EVIDENCE.

In a prosecution for obstructing a highway the State is not confined to documentary evidence of its establishment, the same as in a prosecution under an indictment charging the obstruction of a county road, but may prove the existence of a highway by evidence of user and consent for the requisite length of time. *State v. Robinson*, 28 Iowa, 514.

MAIMING OR DISFIGURING.

SECTION 3857. If any person, with intent to maim or disfigure, cut or maim the tongue; cut out or destroy an eye; cut slit, or tear off an ear; cut, bite, slit, or mutilate the nose or

lip; cut off or disable a limb or any member of another person, he shall be punished by imprisonment in the penitentiary not more than five years, and by fine not exceeding one thousand dollars nor less than one hundred dollars. [Limitation, by section 4167, three years.

Form of Indictment.

THE STATE OF IOWA } District Court of the county of term, 1878.
vs. }

Indictment.

The grand jury of the county of , in the name and by the authority of the State of Iowa, accuse . . . of the crime of disfiguring another, committed as follows: Thesaid . . . on the day of . . . 187 . in the county of . . . and State of Iowa, did then and there, with force and arms, in said county and state aforesaid, and being then and there armed with a certain dangerous weapon, to wit: a knife, with intent to disfigure one C D willfully, unlawfully and feloniously make an assault, and did then and there, with the said knife, feloniously cut and slit the nose of him the said C D, contrary to and in violation of law.

If the offense is mayhem, or maiming, then so charge, stating the member so maimed. No offense of maiming can be charged unless some member, necessary for a person's defense, is injured.

MAIMING—MAYHEM.

The word "maim" implies a permanent injury. Such is its signification under a statute making it indictable to kill, maim or wound any cattle, and the same appears to be its general legal meaning. At common law a maim, or mayhem, is such an injury as renders a man less able in fighting, to defend himself or annoy his adversary. Sec. 331., 1 Bishop Crim. Law, 4th edition, page 332. So the cutting off or disabling or weakening a man's hand or finger, striking out an eye or foretooth, castrating him or breaking his skull. Kelly's Crim. Law, Sec. 523, page 277.

ELEMENTS.

Under a Massachusetts statute of 1805, it was held that the cutting off an ear is not a felony, for the reason that it did not deprive a person of his power of defense in fighting. *Commonwealth v. Newell*, 7 Mass., 245.

VERDICT OF LESSER OFFENSE.

Where the defendant is charged with maiming or disfiguring, he may be acquitted of maiming, and found guilty of an assault, or an assault and battery, as every battery necessarily includes an assault; likewise every intentional disfiguring and maiming, under the law, includes a battery as well as an assault, and where the maiming or disfiguring is charged it is not necessary to charge an assault in order to justify the jury in finding a

verdict for an assault, or an assault and battery, on the principle that the greater includes the lesser offense. *Benham v. State*, 1 Iowa, 542; *McBride v. State* 2 Eng., 374; *Stewart v. State*, 5 Haussner, 241; *State v. Kennedy*, 7 Blackf., 233; *State v. Absence*, 4 Porter, Ala., 397.

EVIDENCE—DEFENSE.

Self defense can only be sustained by proof that the resistance was in proportion to the injury offered. *Hayden v. State* 4 Blackford, 546.

MALICIOUS THREATS.—EXTORTION.

SECTION 3871. If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent thereby to extort any money or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be punished by imprisonment in the penitentiary not more than two years or by a fine not exceeding five hundred dollars. [Limitation, by Sec. 4167, three years.]

The indictment may be in the following form:

THE STATE OF IOWA	}	District Court of the county of term, 1878.
vs.		
.	}	<i>Indictment.</i>
.		

The grand jury of the county of in the name and by the authority of the State of Iowa, accuse of the crime of maliciously threatening to accuse another of a crime committed as follows: That the said on the . . . day of 1877, in the county of and State of Iowa, with intent to extort money from one A B, did maliciously and feloniously, verbally threaten to accuse the said A B, of the crime of adultery with one C B, wife of said L F, the defendant, contrary to and in violation of law.

SECOND COUNT. And the jurors aforesaid, upon their oaths aforesaid, do further in the name and by the authority of the State of Iowa, aver, find and present, that the said L F, at and within the county and state aforesaid, on the . . . day of 18 . . . with intent to extort money from one A B maliciously and feloniously, did, by a written communication, by the said L F sent to the said A B, threaten to accuse him, the said A B, of the crime of adultery with one C B, wife of the said L F, contrary, etc.

Or, did feloniously and maliciously threaten to shoot one A M, then and there being, with intent then and there, by means of said threat to compel the said A M to submit to his person being searched, the same being against the will of the said A M, and contrary, etc.

The above form is approved in *State v. Young*, 26 Iowa, 123. The compelling by means of threats or personal violence, though without any felonious intent, the payment of money or delivery of any property is an offense under the Iowa Code. Sec. 3871, above cited. *State v. Hollyway*, 41

Iowa, latter part of page 203. Where the indictment seeks to charge that the defendant threatened to accuse one of embezzlement, it should allege that the person so threatened to be accused of embezzlement "was in the employment of some person or corporation, as servant, agent or otherwise," so as to show that he had an opportunity to commit the crime threatened.

NECESSARY INGREDIENTS OF THE OFFENSE.

Extortion and pecuniary advantage are not necessary ingredients in the offense of maliciously threatening to do an injury to another, with intent thereby to compel the person threatened to do an act against his will. *State v. Young*, 26 Iowa, 122.

ELEMENTS—WRITTEN COMMUNICATION.

To send the following communication is not considered as sending a letter containing threats of injury:

"WASHINGTON Co., Dec. 2, 1865.

"MR. W. D. HALL—*Dear Sir:* Upon examining the excise law, I find that note you made me require stamp, and that you are liable to fine of two hundred dollars for not stamping it. You will please call immediately and make satisfaction, and save yourself trouble. Yours, with respect, W. A. BRABHAM." *Brabham v. State*, 18 Oh. St., 485.

INDICTMENT, SUFFICIENCY OF.

Under section 4633, Code of Tennessee, which is substantially the same as the Iowa Code above given, an indictment which charges the defendant with maliciously threatening B. "that he should suffer the consequences if he did not leave a certain road," and then, by way of explaining the meaning of said language, "that he meant thereby to kill him, or do him some great bodily harm," sufficiently charged the offense. *State v. Morgan*, 3 Heisk., 262; 1 Gr., Cr. Rep., 521.

ELEMENTS CONSTITUTING THIS CRIME.

The sending of a letter need not come directly from the defendant to the prosecutor; if it be proved to be sent by his means and directions it is sufficient. 27 Geo., 2 C. 15. So, where the prisoner dropped the letter into a vestry room, which the prosecutor frequented. *Rex v. Lloyd*, 2 East. P. C.,

1122. So where the letter was in the handwriting of the defendant who had sent it to the post-office from whence it was delivered in the usual manner. *Rex v. Hennings*, 2 East. P. C., 1116; also, 1 Den., C. C. R., 30. So the fixing a threatening letter on a gate with intent that the prosecutor should receive it. 1 Cox, Cr. Cases, 16. Where there is no person in existence, of the precise name which the letter bears as its address, it is a question for the jury, whether the party into whose hands it falls was really the one for whom it was intended. *Rex v. Carruthers*, 1 Cox C. C., 139; see, also, generally Roscoe, Cr. Ev., 7th Ed., 952.

EVIDENCE TRUTH OF ACCUSATION.

On an indictment for maliciously threatening to accuse a person of a crime with the intent to extort money, it is held that evidence of the truth of the threatened accusation or commission of crime is admissible on the question of intent. As it is said, per AMES, J.: "If Robinson had in fact made such an assault upon the defendant's wife, the defendant might lawfully demand reparation. If the wrong, which he had offered to prove, had in fact been committed, the demand which the defendant made for payment may have been without the intent to extort money, necessary to constitute the crime alleged in the indictment. *Commonwealth v. Jones*, 121 Mass., 57; 23 Am. R., 257.

MANSLAUGHTER.

SECTION 3856. Any person guilty of the crime of manslaughter, shall be punished by imprisonment in the penitentiary not exceeding eight years, and by fine not exceeding one thousand dollars.

Limitation, by section 4165: "A prosecution for murder may be commenced at any time after the death of the person killed."

FORM OF INDICTMENT.

An indictment, the form of which is given under the title "Murder," will answer for manslaughter, and without allegations that the act was done "deliberately, premeditatedly and with malice aforethought." We here give a form as approved

under the New York statutes, omitting the formal part; "in and upon one H. L., she, the said H. L., being then and there pregnant with quick child, feloniously and willfully did make an assault, and that he, the said did then and there feloniously and willfully use on, in and upon the womb and body of the said H. L., the mother of the said quick child, a certain instrument, to-wit, a piece of steel wire, of the length of six inches, with the intent thereby to then, and there destroy the foetal life of the said quick child, and the same not being necessary to preserve the life of her, the said H. L., the mother of the said quick child. And the jurors aforesaid, upon their oath aforesaid do further present, that the said H. L. by means of the said use of the said instrument, willfully and feloniously, aforesaid, upon her womb, by the said, became mortally wounded and distempered, and of the said mortal wounding and distempering, languished from the day first aforesaid, until the day first above named, when she, the said H. L., of said mortal wounding and distempering, died, so the jurors aforesaid, upon their oath aforesaid, do say that he, the said, willfully and feloniously, by the means aforesaid, her, the said H. L., on the day and in the year last aforesaid, did kill and slay, against the form of the statute, etc. *Hunt v. People*, 3 Park. Cr. R., 569.

The procuring an abortion under the New York statutes, is manslaughter in the second degree, and under the Iowa statutes it is also, murder in the second degree.

INDICTMENT.

An indictment for manslaughter, by striking the deceased upon her head and throwing her on the floor, is sustained by proof that the defendant struck her on the head, and that she fell upon the floor and was killed by striking on a chair in her fall. *Com. v. McAfee*, 108, Mass., 458; 11 Am. R., 383.

UNLAWFUL ACT, ALLEGATION OF.

The indictment should allege that the prisoner was engaged in the commission of some unlawful act. And to allege "that the prisoner made an assault, upon the person killed, unlawfully discharging and shooting off at him a loaded gun," sufficiently describes an unlawful act. *Suttcliffe v. State*, 18 Ohio, 469.

STATUTORY LANGUAGE.

Under the Michigan statute an indictment, or, as termed under that law, "information" which charges that the respondent on the day and year named,—"One Mary A. Bowers, feloniously, willfully and wickedly did kill and slay, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Michigan," is held to be sufficient. *People v. Olmstead*, 30 Mich., 431.

ELEMENTS CONSTITUTING MANSLAUGHTER.

Manslaughter is defined to be the unlawful and felonious killing of another, without any malice, express or implied, and is divided into two kinds: first, where a man doing an unlawful act, not amounting to a felony, by accident kills another, and this is called involuntary manslaughter; second, where a man kills another without malice, either express or implied, either unlawfully upon a sudden quarrel, or unintentionally, while the slayer is in the unlawful commission of some act not amounting to a felony. *State v. Abarr*, 39 Iowa, 185.

MALICE.

A homicide committed in a sudden passion or heat of blood, without deliberation and without malice, is not murder in the second degree, but manslaughter. Malice is not essential in manslaughter. *State v. Spangler*, 40 Iowa, 365.

If an injury be inflicted with a weapon and in a manner not likely to produce death, and the trespasser should happen to be killed, it would be no more than manslaughter. *State v. Vance*, 17 Iowa, 138.

ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER.

A defendant may be convicted of an assault with intent to commit manslaughter. *State v. White*, 45 Iowa, 325; overruling *Same v. Same*, 41 Iowa, 316.

RECKLESS USE OF A GUN OR WEAPON.

If one fires a gun recklessly or heedlessly, and death is caused thereby, the offense will be at least manslaughter, notwithstanding the gun was pointed in the range of the deceased by accident, with no desire or intention to wound or kill. *State v. Vance*, 17 Iowa, 138. The following instructions in

regard to the reckless use of firearms were held to be correct and sustained:

"On the charge of manslaughter, if the defendant used a dangerous and deadly weapon in a careless and reckless manner, by reason of which the instrument so used was discharged, he is guilty of manslaughter although no harm in fact was intended. *Eighth*. I submit to you to find the facts of carelessness and recklessness under the evidence, and if you find that the death of the party was occasioned through recklessness and carelessness of the defendant, then you should convict him, and if not, you should acquit. And by this I do not mean that defendant is to be held to the highest degree of care and prudence in handling a dangerous and deadly weapon, but only such care as a reasonably prudent man should, and ought to, under like circumstances; and, if he did not use such care he should be convicted, otherwise he should be acquitted." *State v. Hardee*, Western Jurist, May No., 1878, page 315.

HUSBAND AND WIFE—JUSTIFICATION.

A man has no right to beat or strike his wife, even if she is drunk or insolent; and if he do so, and she die from such beating, he will be guilty of manslaughter, at least. *Com. v. McAfee*, 103 Mass., 458; 11 Am. R., 383; *People v. Winters*, 2 Park. Cr. R., 10; *Perry v. Perry*, 2 Paige, 501, 503; *Com. v. Fox*, 7 Gray, 585.

WITHOUT A FELONIOUS INTENT.

It is held that unless the unlawful act of violence intended was felonious, the offense was manslaughter. *State v. McNab*, 20 N. H., 160; *State v. Smith*, 32 Maine, 369; *Wellar v. People*, 30 Mich., 16; *State v. Jarratt*, 1 Ired., 76; *Holly v. State*, 10 Humph., 141; *Rex v. Kelly*, 1 Moody C. C., 113; *Darry v. People*, 10 N. Y., 120; 1 East. P. C., 270; *Com. v. Fox*, 7 Gray, 585.

INTENT IS NOT A NECESSARY INGREDIENT.

In manslaughter, an intent to kill is not a necessary ingredient. *Montgomery v. State*, 11 Ohio, 424.

BY AN OFFICER IN ATTEMPT TO ARREST.

Where an officer made an attempt to arrest a prisoner with-

out a warrant, and it appearing that the deceased, knowing the officer and the cause of arrest, violently resisted the arrest, it is not unlawful for the officer to use force, in return, to make the arrest, or to defend himself against the attack of the offender, without notice to him of the cause of arrest, or of the abandonment of the attempt to make the arrest. *Wolf v. State*, 19 Ohio St., 248.

EVIDENCE, SUFFICIENCY OF—MOTIVE.

It is in cases of proof by circumstantial evidence that the motive often becomes not only material but controlling, and in such cases the facts from which it may be inferred must be proved; it cannot be imagined, any more than any other circumstance in the case. The same degree of certainty is requisite to convict of manslaughter. *People v. Bennett*, 49 N. Y., 137.

STATEMENTS BY DECEASED AS TO CONDITION OF HEALTH.

The representations of deceased persons as to the state of their health, where relevant to the issue, have been frequently received, without proving that they were made under the belief of approaching death. *Aveson v. Lord Kinnaird*, 6 East., 188, 198; 1 Phil. Ev., 233; *Hunt v. People*, 3 Park. Cr. R., 569.

MINGLING POISON WITH FOOD WITH INTENT TO KILL OR INJURE.

SECTION 3877. If any person mingle any poison with any food, drink, or medicine, with intent to kill or injure any human being, or willfully poison any spring, well, cistern, or reservoir of water, he shall be punished by imprisonment in the penitentiary not exceeding ten years and by fine not exceeding one thousand dollars. [Limitation, by section 4167, three years.

Form of Indictment.

THE STATE OF IOWA, } In District Court of . . . County, . . . term, 1878.
vs. }
. } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . , of the crime of mingling poison with food, committed as follows: That the said defendant on the . . . day of . . . , 187 . . . , in the county of . . . , and State of Iowa, did willfully and maliciously mix and mingle a large quantity of a deadly poison, called white arsenic, to-wit: two drachms of the said arsenic in and with a certain sack of flour, then and there being in the possession of one A M, with intent then and there feloniously and willfully to cause the death of the said A M, contrary to and in violation of law.

Or, unlawfully and knowingly, did prepare, mix and mingle a large quantity, to-wit: twelve grains of a certain poison called cantharides, commonly termed Spanish flies, with a certain quantity of water, to-wit: one gill and a certain quantity of gin, with intent that on A M, then and there being, should drink and swallow down the said cantharides, commonly termed Spanish flies, so prepared, mixed and mingled with the water and gin aforesaid, with intent then and there and thereby to do her, the said A M, an injury.

This form is approved in *Madden v. State*, 1 Kansas, 340.

INDICTMENT—ALLEGATIONS—DUPLICITY.

The alleging of the taking and of the consequence and effect of the drugs or medicines, is not required, and form no part of the crime; and if alleged must be regarded as surplusage; nor that water, or gin, with which the drug was mixed, was a drink. *Madden v. State*, 1 Kansas, 340. So, to charge "did cause to be administered and did administer," is not bad for duplicity. *La Bean v. People*, 6 Park. Cr. R., 371

INTENT TO TAKE THE DRUG.

It is not necessary to allege that the water was mixed with intent that one should drink it. The charge is sufficient if it charges that the mixing was done with intent to "injure or kill." *Madden v. State*, 1 Kansas, 340.

FELONIOUS.

The word "feloniously" might be properly charged under the common law, but no such allegations are required under the Kansas statute, which is in substance the same as the Iowa Code. *Madden v. State*, 1 Kansas, 340.

ELEMENTS — ADMINISTERING WITH INTENT TO HAVE SEXUAL INTERCOURSE.

If the prisoner mingled cantharides with other substances for the purpose of exciting the sexual passions of a female, in order that he may have intercourse with her, this constitutes an offense. *People v. Carmichael*, 5 Michigan, 10; 9 Cox's C. C., 20; 31 L. J. M. C., 72.

INTENT—THE DOING OF ONE UNLAWFUL ACT TO ACCOMPLISH ANOTHER.

Where the defendant mixed the drug for the purpose of having sexual intercourse, and thereby was guilty of seduction, or rape, this would not be a defense; but he can be convicted of mixing drugs with food or drink, and if a double intent existed to commit two indictable acts, the question which was

the principal, and which the subordinate intent was immaterial, as a conviction was proper on an indictment for either. *People v. Carmichael*, 5 Michigan, on page 15; *People v. Edwards*, 5 Mich., 22. See, also, to the same effect, *Rex v. Shadbolt*, 5 Car. & P., 504; *Regina v. Howell*, 9 Carr & P., 437; *Rex v. Gillon*, 1 Moody C. C., 85; *Hunt's Case*, 1 Moody, 93; *Cox's Case*, Russ & Ry., 362; *Regina v. Bowen*, 1 Car. & M., 149; *Regina v. Button*, 11 Q. B., 929; 8 Car. & P., 660.

KNOWLEDGE OF PRISONER AS TO THE EFFECT OF DRUGS.

A defendant may not know that the effect would be produced which actually occurred; this, however, is no excuse. Where an unlawful act is done, the law presumes it was done with an unlawful intent. *People v. Carmichael*, 5 Michigan, on page 17; *York's Case*, 9 Metcalf, 103. So it has been held, that if poison is administered without authority, and with a design to produce harmless sleep, the party is nevertheless guilty of the consequences of his acts. 11 Humph., 159; *Rice v. State*, 8 Mo., 561; *Rex v. Long*, 4 Car. & P., 398, 423; *Rex v. Spiller*, 5 C. & P., 333. Being an unlawful act, and resulting in physical injury, the criminal intent is to be inferred from the nature of the act and its actual results. 3 Bl. Com., 120; *Commonwealth v. Burke*, 105 Mass., 376; 7 Am. R., 531; *Regina v. Lock*, 12 Cox's C. C., 244; *Regina v. Sinclair*, 13 Id., 28; *Commonwealth v. Stratton*, 114 Mass., 303; 19 Am. R., 350.

EVIDENCE OF PRIOR ATTEMPT TO DRUG.

It is said in 21 Michigan, on page 227, *per* GRAVES, J., "while we desire not to be understood as admitting that it was incompetent for the people to give evidence of a prior attempt by the prisoner a short time before that charged in the information, and of the same nature, as bearing upon the question of intent, we find no occasion at present to consider that question."

CONDUCT OF PRISONER TOWARDS INJURED PARTY.

It is proper for the people to show the conduct of the defendant towards the person to whom he gave the drug, and also that of others there at the time. *People v. Doyle*, 21 Michigan, 221.

In order to see what application the Michigan decisions have under the Iowa Code, the following is the section of the Michigan statutes relied on, being nearly the precise words of the Iowa Code: "If any person shall mingle any poison with any food, drink or medicines, with intent to kill, or injure any other person, or shall willfully poison any spring, well or reservoir of water, with such intent, he shall be punished by imprisonment in the state prison for life, or any term of years."

MINORS PROHIBITED IN BILLIARD SALOONS.

LAWS OF 1874, CHAPTER 59, PAGE 46.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. It shall be unlawful for any person who keeps a billiard hall, beer saloon, or nine or ten pin alley, or the agent, clerk, or servant of any such person, or any person having charge or control of any such hall, saloon, or alley, to permit any minor or minors to remain in such hall, saloon or alley, or to take part in any of the games known as billiards, nine or ten pins.

SEC. 2. For a violation of the provisions of the foregoing section, the offender shall, on conviction, thereof, be punished by a fine not less than five dollars nor exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days.

Approved, March 21, 1874. [Limitation, by section 4168, one year.]

Form of Information.

THE STATE OF IOWA, }
vs. } Before . . . , a justice of . . . Co., Iowa.

Information.
The defendant is accused of the crime of permitting a minor to play billiards in his, the defendant's, saloon.

For that the said . . . , in the city of . . . county of . . . and State of Iowa, on the . . . day of . . . , did keep a saloon, and while so under his care, control and charge did then and there in his said saloon on said day aforesaid willfully and unlawfully permit one . . . to play at billiards in his said saloon, to-wit: a game of billiards with one . . . , having then and there a billiard table in his said saloon, and the said . . . being then and there a minor, and the defendant permitting said playing contrary to and in violation of law.

Or, the said . . . being then and there the owner, and having charge and control of a saloon in said . . . did unlawfully and willfully permit a minor to remain in his billiard saloon, to-wit: one . . . , he the said . . . then and there being a minor, contrary to and in violation of law.

INDICTMENT.

Under a statute which prohibited the keeper of a billiard table from allowing a minor to play on it, and inflicts a fine for each game allowed to be played, an indictment which does

not allege that a game was played, or name the person with whom the minor played, or give any reason for not naming him, is bad, on motion to quash. *Zook v. State*, 47 Ind., 463; 1 Am. R., 240. The indictment should charge that the minor did or was allowed to play a game. 1 Am. Cr. R., 240; *Quinn v. State*, 35 Ind., 485; *Whitney v. State*, 10 Ib., 404; *State v. Newland*, 29 Ib., 212.

BURDEN OF PROOF.

On the trial of an indictment for permitting a minor to play billiards without the consent of his parents or guardian, the burden of proof is on the State to show that the minor did not have the consent of his parents or guardian. *Conyers v. State*, 50 Ga., 103; 1 Am. Cr. R., 237.

MISDEMEANORS AND PUNISHMENT THEREOF.

SECTION 3966. When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor.

SEC. 3967. Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this State, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.

MIXING, AND SELLING MIXED OILS.

SECTION 3901. If any person mixes for sale naphtha and illuminating oils, or shall keep or offer for sale, or sell such mixture, or shall keep or offer for sale or sell oil made from petroleum for illuminating purposes, or any other product of petroleum inflammable at a less temperature or fire test than one hundred and ten degrees Fahrenheit, he shall be deemed guilty of a misdemeanor, and punished for the first offense by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days; and for the second and every succeeding offense, by fine not less than one hundred and not more than one thousand dollars, or by imprisonment in the county jail not less than thirty days nor more than twelve months, or by both such fine and imprisonment. [Limitation, by section 4168, one year for the first offense, and for the second offense, under section 4167, three years.]

Form of Information.

THE STATE OF IOWA, } In Justices Court, before . . . , a Justice of . . .
 vs. } County.
 } *Information.*

The defendant is accused of the crime of selling naphtha mixed with oil. For that the said . . . on the . . . day of . . . , 187 . . . , in the city of . . . , county of . . . , and State of Iowa, did unlawfully and knowingly sell a certain quantity of naphtha, to-wit: one gallon, the same being mixed at the time with illuminating oils, to-wit: kerosene, the same being at a less temperature or fire test than one hundred and ten degrees Fahrenheit, contrary to and in violation of law.

And for a second and subsequent violation it becomes an indictable offense. The formal part of the indictment may be as follows:

THE STATE OF IOWA, } In District Court of . . . County, . . . term, 1878.
 vs. }
 } *Indictment.*

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of (here insert substantially the same as charged in the foregoing information).

MURDER.

SECTION 3848. Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder.

SEC. 3849. All murder which is perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, is murder of the first degree, and shall be punished by imprisonment for life at hard labor in the state penitentiary.

SEC. 3850. Whoever commits murder otherwise than is set forth in the preceding section, is guilty of murder of the second degree, and shall be punished by imprisonment in the penitentiary for life, or for a term not less than ten years.

SEC. 3851. Upon the trial of an indictment for murder, the jury, if they find the defendant guilty, must inquire, and by their verdict ascertain, whether he be guilty of murder of the first or second degree; but if such defendant be convicted upon his own confession in open court, the court must proceed by the examination of witnesses to determine the degree of murder, and award sentence accordingly.

CHAPTER 165—RE-ESTABLISHING CAPITAL PUNISHMENT.

AN ACT to Repeal Section 3349, Chapter 2, Title 24, of the Code, and to Enact a Substitute Therefor, and to Restore Capital Punishment.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That section 3849, chapter 2, title 24, of the

Code, be and the same is hereby repealed, and the following enacted in lieu thereof, to-wit:

SEC. 3849. All murder which is perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary, is murder in the first degree, and shall be punished with death "or imprisonment for life at hard labor, in the state penitentiary, as determined by the jury."

SEC. 2. Upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor in the penitentiary.

SEC. 3. When a verdict of death has been agreed to by a jury, the court pronouncing judgment shall fix the day of the execution thereof, which shall not be less than one year after the day on which the judgment is rendered, and not longer than fifteen months, during which time the defendant, against whom judgment of death has been pronounced, shall be imprisoned in the penitentiary of the state.

SEC. 4. Immediately after the entry of the judgment of death, the court rendering such judgment must transmit by mail to the governor of the state, a copy of the indictment, plea, verdict, judgment, and of the testimony in the case.

SEC. 5. When a judgment of death is pronounced, a certified copy of the entry thereof in the record book must be furnished to the officer whose duty it is to execute the same, who shall proceed and execute accordingly, and no other warrant or authority is necessary to require or justify the execution.

SEC. 6. The only officer [s] who shall have power to reprieve or suspend the execution of a judgment of death, are the governor and the sheriff, as provided in the next section, unless in case of an appeal to the supreme court, as provided in section 18 of this act.

SEC. 7. When the sheriff is satisfied that there are reasonable grounds for believing that the defendant is insane or pregnant, he may summon a jury of twelve persons on the jury list, to be drawn by the clerk, who shall be sworn by the sheriff well and truly to inquire into the insanity of [or] pregnancy of the defendant and a true inquisition return, and they shall examine the defendant and hear any evidence that may be presented, and by written inquisition, signed by each of them—find as to the insanity or pregnancy, and unless the inquisition find the defendant insane or pregnant, the sheriff shall not suspend the execution. But if the inquisition find the

defendant insane or pregnant, he shall suspend the execution and immediately transmit the inquisition to the governor.

SEC. 8. Whenever a judgment of death has not been executed on the day appointed by the court therefor, from any cause whatever, the governor, by a warrant under his hand and the seal of the state, shall fix the day of execution, which warrant shall be obeyed by the sheriff, and no one but the governor can then suspend its execution.

SEC. 9. A judgment of death must be executed by the sheriff on the day fixed in the judgment, between sunrise and sunset, by hanging the defendant by the neck until he is dead.

SEC. 10. A judgment of death must be executed within the walls of the jail of the county in which the judgment was rendered, or within a yard or enclosure adjoining thereto, unless as provided in the next two sections.

SEC. 11. If there be no jail in the county in which the judgment was rendered, or if it becomes unfit or unsafe for the confinement of prisoners, or be destroyed by fire or other wise, and the jail of any other county has been legally designated for the imprisonment of the defendant until the day fixed for his execution, the judgment must be executed within the walls of the jail of the county so designated, or within a yard or enclosure adjoining the same, and by the sheriff of such county.

SEC. 12. If there be two or more jails or prisons in the same county, a judgment of death shall be executed within the walls of either of such jails or prisons, or within an enclosure adjoining thereto, as the court rendering such judgment shall therein direct.

SEC. 13. The sheriff executing a judgment of death must, at least three clear days before inflicting the punishment of death, notify the judge of the district court of his county, the district attorney, the clerk of the district court, together with two physicians and twelve respectable citizens of his county, to be selected by him and the sheriff of the county in which the trial was had and the offense committed (if it be in a different county), to be present as witnesses of such execution. He must also, at the request of the defendant, permit one or more ministers of the gospel, whom the defendant shall name, and any of his relations to attend the execution, and also such magistrates, peace officers and guards as the sheriff shall deem proper. But no person, other than those mentioned in this section, can be present at the execution, nor shall any person under age be permitted to witness the same.

SEC. 14. The sheriff or his deputy, executing the judgment of death, and the judges attending the execution, must prepare,

and sign with their name of office, a certificate setting forth the time and place of the execution, and that judgment was executed upon the defendant according to the foregoing provisions, and must cause the certificate to be signed by the public officers, and at least twelve (12) persons, not relations of the defendant, who witnessed the execution.

SEC. 15. The sheriff or his deputy executing such judgment of death, must cause the certificate to be filed in the office of the clerk of the district court of the county in which the judgment was rendered, and a copy thereof to be published in a newspaper printed at the capitol of the state, and in one, if any, published in his county.

SEC. 16. An appeal by the defendant to the Supreme Court, from a judgment of death, shall stay the infliction of that punishment, but the defendant is to be retained in custody to abide the judgment on the appeal.

SEC. 17. When an appeal is taken from a judgment of death, it shall be the duty of the clerk of the district court in which the judgment was rendered, to give, forthwith, to the defendant, his agent or attorney, a certificate under his hand and the seal of the county, stating that an appeal has been taken in the case, and the sheriff or other officer having the custody of the defendant, must, upon the delivery of such certificate to him, refrain from the infliction of the punishment of death upon the defendant, and retain him in custody, to abide the judgment of the appeal.

SEC. 18. When a judgment of death has been affirmed, the Supreme Court must cause a copy of the entry of judgment to be remitted to the governor, to the end that a warrant of the execution may be issued by the governor. The governor shall send his warrant of execution by a special messenger, or by mail, to the proper officer, and shall name therein the day and time of execution, but shall not appoint an earlier day than that fixed by the judgment of the district court. The officer receiving the same shall execute the warrant of the governor as therein directed, and shall report his action, both to the governor and the district court which rendered the original judgment. If for any cause the execution does not take place on the day appointed by the governor, the governor may from time to time appoint another day for the execution until the judgment is carried into effect.

SEC. 19. All indictments pending in any court of this state for any crime committed in violation of said section 3849 of the Code shall be prosecuted to final judgment, and all crimes that have been committed in violation of said section shall be subject to indictment, trial and punishment in the same manner as they would have been had said section not been repealed.

SEC. 20. All acts and parts of acts inconsistent with this act are hereby repealed.

Approved, March 26, 1878.

CHAPTER 103—BAIL IN CASE OF MURDER.

AN ACT to prohibit Defendants convicted of Murder being admitted to bail, amending Section 4107, Chapter 1, Title XXV, of the Code.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That no defendant convicted of murder shall be admitted to bail.

Approved, March 23, 1878.

[Limitation, by section 4165: A prosecution for murder may be commenced at any time after the death of the person killed.]

Form of Indictment.

THE STATE OF IOWA } District Court of the County of term, 1878.
vs. } Murder.

Indictment.

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of murder, committed as follows: That the said . . . on the . . day of . . , 187 . . in the county of . . and State of Iowa, in and upon the body of one . . , then and there being willfully, feloniously, deliberately, premeditatedly, by lying in wait, and of his malice aforethought, did commit an assault with a deadly weapon, being a pistol, then and there held in the hands of the said . . , and loaded and charged with powder and bullet, and then and there the said . . , did, by lying in wait, with the specific intent, to kill and murder the said . . , willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, shoot off and discharge the contents of said deadly weapon at, against, into and through the head and body of the said . . , thereby willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, inflicting upon the head and body of the said . . a mortal wound, of which mortal wound the said . . , then and there did die. *Held*, 1. That this indictment was sufficient as charging murder in the first degree. 2. That the time of the death, was sufficiently alleged, as being at the time and place when and where the assault was made. 3. That the indictment was sufficient as charging that the deceased was a human being. *State v. Stanley*, 33 Iowa, 526. In case of the *State v. Davis*, 41 Iowa, 312. The form of the indictment which the court held to be a good indictment for murder, is as follows:

THE STATE OF IOWA } District Court of Pottawattamie county, Iowa, No-
vs. } vember term, 1873.

THOMAS E. DAVIS.

The grand jury of the county of Pottawattamie, in the name and by the authority of the State of Iowa, accuse Thomas E. Davis of the crime of manslaughter, on the 29th day of August, A. D. 1873, in said county of Pottawattamie, and State of Iowa, willfully, deliberately, premeditatedly, and of his malice aforethought, and with intent to kill and murder one Charles Granville, feloniously did strike, stab, and cut the said Charles Granville across his, the said Charles Granville's abdomen, with a certain knife which he, the said Thomas E. Davis, then and there had and held in his hand; then and there inflicting a mortal wound, of which said wound, so inflicted, as aforesaid, by the said Thomas E. Davis, the said Charles Granville: then and there died. So that the grand jury aforesaid say that the said Thomas E. Davis, on the 29th day of August, A. D. 1873, at the county of Pottawattamie, in the State of Iowa, in manner and form as aforesaid, did willfully, deliberately, premeditatedly, and of his malice aforethought, feloniously kill and murder the said Charles Granville, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Iowa.

Also, for forms generally, see *Lake v. People*, 1 Park. Cr. R., 495; *People v. Robinson*, 2 Park. Cr. R., 235; *People v. Ruloff*, 3 Park. Cr. R., 401.

INDICTMENT—ALLEGATIONS OF MURDER—KILL.

An indictment for murder, under the common law, should aver specifically that the defendant, "*murdered*" the deceased. 2 Hawk's Pl. C. C., 23; 1 East. P. C., Sec. 117; Foster Cr. Law, 424; *Commonwealth v. Gibson*, 2 Vir. Cases, 70; *State v. Heas*, 10 La. Ann., 195; *Dias v. State*, 7 Blackf., 20; *State v. O'Neil*, 23 Iowa, 274. But under the Iowa criminal procedure, these technical words and phrases are not essential. *State v. O'Neil*, 23 Iowa, 274; *Fouts v. State*, 4 G. Greene, 500; *State v. McCormick*, 27 Iowa, 402; *State v. Watkins*, 27 Iowa, 415; *State v. Knouse*, 29 Iowa 118; *State v. Stanley*, 33 Iowa, 526.

DELIBERATE, IS AN ESSENTIAL ALLEGATION.

An indictment for murder in the first degree must charge the killing to have been deliberate as well as willful and premeditated. An indictment which charged the killing to have been "willful, felonious, premeditated, and with malice aforethought," is held insufficient as an indictment for murder in the first degree. Under the Iowa statute murder in the first degree is a *willful, deliberate* and *premeditated* killing. "Willful" implies that the act was *willed* by the perpetrator, of purpose, with the intent that the life of the party killed should be destroyed. Wharton on Homicide, 365; *State v. Boyle*, 28 Iowa, on page 524; *Smith v. State*, 1 Kansas, on page 388; *State v. Johnson*, 8 Iowa, 528.

"Deliberate" implies that the perpetrator weighs the motives for the act and its consequences, the nature of the crime, and other things connected with his intentions, with a view to a decision thereon; and that the act is not suddenly committed. Hence, if the mind be not in a condition to deliberate from intoxication or from any other cause, the offense would be murder in the second degree. It becomes necessary, therefore, to determine the state of mind of the accused in order to pronounce him guilty of murder in the first degree. *Pirtle v. State*, 9 Humph., 663; *Haile v. State*, 11 Humph., 154; Wharton on Homicide, 369; *State v. Boyle*, 28 Iowa, on page 524.

DESIGNATED AS MANSLAUGHTER WHEN MURDER.

Where the offense was designated in the indictment as manslaughter, but the statement of facts defined the crime as murder, the defendant was held to have been properly put

upon his trial for the latter offense. *State v. Davis*, 41 Iowa, 311.

JURISDICTION—LOCAL DESCRIPTION—COUNTY—STATE.

An indictment for murder is sufficient which charges the giving of the fatal blow in the county in which the prosecution is had, and the fact of ensuing death, although it failed to allege specifically in what county or state the death took place. *State v. Bowen*, 16 Kansas, 475; *Tyler v. People*, 8 Mich., 320; *Commonwealth v. Malcom*, 101 Mass., 1; while it is held in Tennessee that where the blow is given in one county and death ensued in another, jurisdiction of the homicide was in the first county. *Riley v. State*, 9 Humphrey, 646; *State v. McCoy*, 8 Rob. R., 545; *State v. Foster*, 7 La. Ann., 255; 8 La. Ann., 290. And in the Kansas case first cited the court further said, on page 479: "It seems to us without pursuing the authorities further, reasonable to hold that as the only act which the defendant does toward causing the death is in giving the fatal blow, the place where he does that is the place where he commits the crime, and that the subsequent wanderings of the injured party, uninfluenced by the defendant, do not give an ambulatory character to the crime."

The word "premeditated" implies that the act is done in pursuance of a prior intention—a predetermination. These three words convey distinct and independent ideas, and that neither of the others can convey the meaning and force of the word "deliberate" omitted in an indictment. *State v. Boyle*, 28 Iowa, on page 524.

The word "felonious," means that the act was done with the intent to commit the crime, that is, that the act was done with the design on the part of the perpetrator to commit the felony with which he is charged. *State v. Boyle*, 28 Iowa, on page 524.

TIME AND PLACE OF DEATH, ALLEGATION OF.

Where the indictment avers "that of these wounds the saidthen and there did die," it points to the time and place when and where the assault was made, which are specifically stated as the time and place of death. *State v. Stanley*, 33 Iowa, on page 530.

HUMAN BEING, ALLEGATION OF.

An averment that the deceased was a human being has never been held necessary. The language of the indictment, and the name applied to the deceased, are always used to describe men, or human beings. *State v. Stanley*, 33 Iowa, on page 530.

MALICE.

In an indictment for murder under the Iowa laws, it is necessary to charge that the act was done with malice aforethought. *State v. Neeley*, 20 Iowa, 110; *State v. Newberry*, 26 Iowa, 467.

MALICE AFORETHOUGHT.

In an indictment for murder in the second degree an allegation of malice aforethought need not be alleged. *State v. Neeley*, 20 Iowa, 110.

ELEMENTS NECESSARY TO CONSTITUTE MURDER.

To constitute murder in the first degree the killing must be "willful, deliberate, premeditated, and with malice aforethought." *Fouts v. State*, 4 G. Greene, 500; *State v. Johnson*, 8 Iowa, 526; *State v. McCormick*, 27 Iowa, 402; *Fouts v. State*, 8 Ohio St., 98; *Kain v. State*, 8 Ohio St., 306; *Hagan v. State*, 10 Ohio St., 459; *Bower v. State*, 5 Mo., 364; *State v. Jones*, 20 Mo., 58; *State v. Feaster*, 25 Mo., 325.

PREMEDITATION.

In order to convict of murder in the first degree, the act must have been done with premeditation, but no specific length of time is required for the deliberation or premeditation. In one case it is said that if the party killing had time to think, and did intend to kill for a minute, as well as an hour or a day, it is deliberate, willful and premeditated killing, constituting murder in the first degree. *State v. Johnson*, 8 Iowa, 525; *Dale v. State*, 10 Yerger, 551; *Commonwealth v. Jones*, 1 Leigh, 612; *Commonwealth v. Greene*, 1 Ashmead, 289; *State v. Spencer*, 1 Zabriskie, 196; *Stone v. State*, 4 Humph., 36; *Kirkpatrick v. Com.*, 31 Penn. St., 108; *Fouts v. State*, 4 G. Greene, Ia., 500; *Commonwealth v. Smith*, 7 Smith's Laws, 647; *Davis v. State*, 2 Humph., 439. To the same effect that

the length of time is immaterial, *Shoemaker v. State*, 12 Stanton, Ohio, 43; *State v. Spencer*, 1 Zabriskie, 196; *Duebbe v. State*, 1 Texas Court of Appeals R., 159.

UPON THE BODY OF DECEASED, LOCATION OF WOUND.

The place of the wound is sufficiently indicated by an allegation that it was "upon the body." By the word "body," in this connection, is to be understood the trunk of the man, in distinction from his head and limbs. *Long's Case*, Coke's R., part 5, 120; *Sanchez v. People*, 22 N. Y., 147.

ALLEGATION OF DEATH.

Where the indictment averred that the defendant did, of his malice aforethought, shoot, kill and murder one . . . , "it sufficiently charged the death without further averring that he died." *People v. Cronin*, 34 Cal., 191; *People v. Sanford*, 43 Ib., 29; 1 Green's Cr. R., 682.

FILING OF INDICTMENT—OMISSIONS.

A statute requiring the filing of an indictment is directory, and the omission to file does not avoid the indictment. *Dawson v. People*, 25 N. Y., 400.

DEFECTIVE INDICTMENT—EFFECT OF ADJUDICATION.

See "Former Adjudication."

MALICE.

Malice is essential to the crime of murder. However, it need not have existed for any considerable length of time, but is sufficient if it existed for any length of time. *State v. Decklotts*, 19 Iowa, 447; *State v. Gillick*, 7 Ib., 287; 1 Hale, 454; 1 Russ on Crimes, 482.

PRESUMPTION OF.

Malice aforethought may be implied from the kind of weapon used, and the manner and circumstances attending its use, as the place where the wound was inflicted, the strength or severity of the blow given, etc. Malice is implied from every case of intentional homicide and is inferred from the fact of killing, and it devolves upon the defendant to rebut the presumption in order to reduce the offense from murder to manslaughter. *State v. Decklotts*, 19 Iowa, 447; *Murphy v. People*, 37 Ill., 447; *State v. Brown*, 12 Minn.,

538; *Clark v. State*, 35 Georgia, 75; *State v. McDonnell*, 3 Vt., 491; *Hayne v. State*, 34 Miss., 616; *State v. Gillick*, Iowa, 218; *State v. Knight*, 43 Maine, 11; *State v. Johnson* 3 Jones (N. C.), 266; *State v. Zeibart*, 40 Iowa, 174; *Ann. v. State*, 11 Humph., 159; *Conn. v. Parker*, 9 Metc., 263; *State v. Moore*, 25 Iowa, 128. And the following cases hold that the use of a deadly weapon is evidence of malice aforethought 1 Wheaton's Crim. Law, section 944; *Commonwealth v. Drew* 4 Mass., 396; *State v. Merrill*, 2 Dev. (N. C.), 269; *Beauchamp v. State*, 6 Blackf., 249; *Kilpatrick v. State*, 31 Penn., 198; *State v. Zeibart*, 40 Iowa, 174.

INTENT.

The intent is essential in murder of the first degree, but not of murder in the second degree. *State v. Decklots*, 11 Iowa, 447; Foster's Crim. Law, 258, 569; *Commonwealth v. Varney*, 8 Bost. Law R., 542; *State v. Kennedy*, 20 Iowa 372; *State v. Morphy*, 33 Ib., 270.

PRESUMPTION OF INTENT.

The intent is presumed and inferred from the deliberate violent use of a deadly weapon, and this intent is malice aforethought. *State v. Zeibart*, 40 Iowa, 174.

MURDER IN SECOND DEGREE—INTENT.

Where death ensues through unlawful acts, and yet not with any intentions to kill, it is murder in the second degree there being no malice. *State v. Shelledy*, 8 Iowa, 505; see also, Foster's Crim. Law, 258, 344, 351; 1 East. P. C., 255 259; 1 Hale's P. C., 443; *U. S. v. Ross*, 1 Gallison, 626 So, the carrying out an unlawful design, if the intent go no further than the commission of a bare trespass, and death ensues, it will only be manslaughter. 2 Bish. Cr. Law, sections 624, 627; *People v. Enoch*, 13 Wend., 163; *People v. Rector*, 19 Ib., 592; 8 Iowa, 505.

ABORTION.

The commission of abortion by a defendant constitutes murder in the second degree. *State v. Moore*, 25 Iowa, 128 *Commonwealth v. Keeper*, 2 Ashm. (Pa.), 227; *Ann. v. State* 11 Humph. (Tenn.), 159; *Com. v. Parker*, 9 Metc., 263 1 Hale P. C., 429, 430.

WHILE PERPETRATING ROBBERY.

Murder committed in perpetrating a robbery is murder of the first degree, although not committed with a "deliberate and premeditated" design to kill. *State v. Pike*, 49 N. H., 399; 6 Am. R., 533.

MUST BE UNLAWFUL.

The commission of the crime must be unlawful or it will not constitute murder, and unless unlawfully done it cannot have been done with malice aforethought. *Bohannon v. Commonwealth*, 8 Bush., 481; 8 Am. R., 474.

KILLING AN OFFICER.

Where an officer having authority to arrest is resisted and killed while attempting to make an arrest, such homicide is murder, but where the arrest is illegal the offense is reduced to manslaughter. *Rafferty v. People*, 69 Ill., 111; 18 Am. R., 601. If the defendant have no knowledge of the officer's business, or if the intention with which a private person interferes, and the officer or private person be resisted or killed, the killing is but manslaughter. 1 Hale's P. C., 465; *Rex v. Hood*, 1 Moody's C. C., 81; 1 East. P. C., 110, 111; *Roberts v. State*, 14 Mo., 138; 18 Am. R., 606. While the officer should make his arrest known, yet if it is known to the defendant his resistance is not justifiable, and no defense. *State v. Anderson*, 1 Hill, 343; *Tinner v. State*, 44 Texas, 131; *Plasters v. State*, 1 Texas Court of Appeals R., 673.

DEGREES, HOW DETERMINED.

To determine the degree, it is only necessary to determine whether it was done deliberately and premeditatedly. *Craft v. State*, 3 Kansas, 450, and the charge of murder in an indictment necessarily, includes the crime of manslaughter. *Roy v. State*, 2 Kansas, 405.

INDEPENDENT LIFE, WHEN IT IS SAID TO EXIST.

Independent life cannot properly be said to exist in an infant prior to the establishment of independent circulation. An infant is not the subject of murder until an independent circulation has been established. Prior to that time the life of the child, even after it is born, is substantially *fœtal* life,

which the law distinguishes from independent life. *S. Winthrop*, 43 Iowa, 519; Wharton & Stiles' Medical Jurisprudence, 2 Vol., Sec. 128; Beck's Medical Jurisprudence, Vol. 498; *Rex v. Enoch*, 5 C. & P., 539; *Regina v. Tr. Carrington & Marshman*, 650.

EVIDENCE, POSITIVE AND DIRECT.

An instruction, that "The death of the party, must be and clearly proved by *direct* and *positive* proof" is erroneous while the proof should be clear and distinct, it is not necessary that it should be *direct* and *positive*, for the crime may be established by circumstantial evidence and a conviction sustained. *State v. Keeler*, 28 Iowa, 552.

IMPROPER INTIMACY OF DEFENDANT.

Where the defendant was indicted for the murder of his wife, it is proper for the State to show certain improper conduct between the prisoner and another woman not his wife prior to the death of defendant's wife, as forming a link in the chain of proof. It is frequently material to show the jealousy, edge, intent or motive of a party, and evidence of this jealousy or intent is always admissible; the testimony would be to show that the affections of the husband were alienated from the wife, and that he would, therefore, be more likely to desire her death. *State v. Hinkle*, 6 Iowa, 380; 11 Sh. 139; 2 Watts & Serg., 441; 2 McLean, 596; 17 Conn., 44; 4 Sm. & Mar., 312.

PRESUMPTION OF THE ACT BEING MALICIOUS.

Where the killing is proved, the presumption is that it was malicious. *State v. Patterson*, 45 Vt., 308; 12 A. 200; *State v. McDonnell*, 32 Vt., 538; 9 Metc., 93; 3 A. 465; *People v. Kirby*, 2 Park Cr. R., 28.

NO PRESUMPTION OF DELIBERATION.

The mere fact of killing is not sufficient to raise a presumption that the act was done willfully and deliberately; in other words, it does not raise the presumption that the defendant is guilty of murder in the first degree. *State v. McCon*, 27 Iowa, on page 413; *State v. Turner*, Wright (Ohio) Hill's case, 2 Gratt. Va., 594; *People v. White*, 24 Wend.

Johnson v. Com., 24 Pa. St., 386; *Kelly v. Com.*, 1 Grant Case (Pa.), 484.

PHYSICIANS—EXPERTS—COMPETENCY.

It is, of course, desirable that great caution should be exercised in conducting experiments of this character, and that the most skillful professional aid should be secured. But to say that none should be permitted to give their opinions, except those of the highest professional skill, or those who had given their lives to chemical experiments, would, in this country, at least, render it impossible, in most cases, to find the requisite skill and ability; the weight of such testimony should be left to the jury. *State v. Hinkle*, 6 Iowa, 381.

EXPERTS—EVIDENCE—INSANITY.

Witnesses who are not experts cannot give their opinion on the question of sanity. *Boardman v. Wood*, 47 N. H., 120; *State v. Pike*, 49 N. H., 399; 6 Am. R., 533.

While it is held that witnesses other than professional men may state their opinion in connection with the facts on which it is founded (*Clark v. State*, 12 Ohio, 483), yet it is not competent for a medical witness who has not heard all the testimony tending to show the mental condition of a person, to give an opinion founded on the portion heard by him as to his insanity. *People v. Lake*, 12 N. Y., 358. But the opinion of a physician who has personal knowledge of the conduct and habits of a person, is competent evidence as to the sanity of such person. *People v. Lake*, 12 N. Y., 358.

EXPERTS GENERALLY.

Every person is competent to express an opinion on a question of identity, as applied to persons, things, animals or handwriting, and may give his judgment in regard to the size, color, or weight of objects, and may estimate time and distances. He may state his opinion in regard to sounds, their character, from what they proceed, and the direction from which they seem to come. *State v. Shinborn*, 46 N. H., 497; *Commonwealth v. Sturtivant*, 117 Mass., 122; 19 Am. R., 401. The correspondence between boots and footprints is a matter requiring no peculiar knowledge, and to which any person can testify. *Com. v. Pope*, 103 Mass., 440. So a person not an

expert may give his opinion whether certain hairs are human hairs. *Com. v. Dorsey*, 103 Mass., 412. And a witness may state what he understood by certain "expressions, gestures and intonations," and to whom they were applied; otherwise, the jury could not fully understand their meaning. *Leonard Allen*, 11 Cush., 241. In this connection may be noticed a large class of cases where, from certain appearances, more or less difficult to describe in words, witnesses have been permitted to state their conclusions in relation to indications of disease or health, and the condition or qualities of animals or persons; as, when a witness testifies that a horse's foot appeared to be diseased, he states a matter of fact open to the observation of common men. *Willis v. Quinby*, 31 N. H., 485; *Whetier v. Franklin*, 46 N. H., 23; or he may testify as to the qualities and appearance of a horse. *State v. Averett*, 44 N. H., 392.

It is competent for a witness to testify to the condition of the health of a person, and that he is ill, or disabled, or has a fever or is destitute and in need of relief. *Parker v. B. and H., B. Co.*, 109 Mass., 449; 30 Ala., 562; 35 Ala., 221; 32 Ala., 703; and one may testify that another acted as if he felt very sad. *Culver v. Dwight*, 6 Gray, 444. So those who have observed the relations and conduct of two persons to each other may testify whether, in their opinion, one was attached to the other. 4 Cow., 355; *People v. Eastwood*, 4 Kern., 562; 1 Mass., 477; 116 Mass., 237. It is also held that a witness who is familiar with blood, and has examined, with a lens, a blood stain upon a coat, when it was fresh, can also testify that the appearance then indicated the direction from which it came and that it came from below upward, although he has never experimented with blood or other fluid in this respect. *Cole v. Sturtivant*, 117 Mass., 122. Stains of blood, found upon the person or clothing of the party accused, have always been recognized among the *indicia* of homicide. The practice of identifying them by circumstantial evidence, and by the inspection of witnesses and jurors, has the sanction of immemorial usage, in all criminal tribunals. Proof of the character and appearance of the stains by those who saw them has always been regarded by the courts as primary and legitimate evidence. *People v. Gonzalez*, 35 N. Y., 49.

FLIGHT OF PRISONER.

Flight, in a criminal prosecution, is one of the most common grounds for a presumption of guilt. And when the flight is connected with the offense charged, and for which the accused is on trial, it is an act that indicates fear, and this fear points to guilt, and is admissible, though it is not conclusive. *Johnson v. State*, 17 Ala., 618; *Martin and Finn v. State*, 28 Ala., 71, 81; *Murrell v. State*, 46 Ala., 89, 7; Am. R., 592; *State v. James*, 45 Iowa, 412.

WRITTEN STATEMENTS—DECEASED WITNESS.

Where, on a preliminary examination, the evidence of a witness for the state was put in writing, and he died before the trial in court, it is held that this statement was admissible, and proper to be introduced. *Brown v. Commonwealth*, 73 Penn. St., 22; P. E. Smith, 321; 13 Am. R., 740. But in a case where, on a former trial, the evidence of a witness was incorporated in a bill of exceptions, and on the cause being reversed this statement was introduced to the jury, it was held error. Parol evidence may be given to show what the deceased witness said, but no written statement, as the prisoner has the right to meet witnesses face to face. *Kean v. Commonwealth*, 10 Bush., 190; 5 Ohio, 354; 10 Humph., 486; *Walston v. Commonwealth*, 16 B. Monr., 15; 19 Am. R., 63.

ADMISSION OF PRISONER—MONEY IN POSSESSION OF DECEASED.

Where it has been shown that the prisoner spoke of an intention to rob the murdered person, the state may show that the murdered person had money before his death, and that none had been found afterward; and the administrator's account is competent evidence of the latter fact. *Hauser v. Commonwealth of Pennsylvania*, 5 Am. Law Register, 668.

ILL WILL OF PRISONER TOWARD DECEASED.

It is proper to show ill will existing between the prisoner and the deceased. *Dillin v. People*, 8 Mich., 357.

DEFENDANT'S ADMISSION UNDER OATH INADMISSIBLE.

Where the prisoner, after his arrest, was taken before an examining magistrate and sworn, this statement, or evidence so given, is inadmissible, and cannot be introduced against the

defendant. *People v. McMahon*, 15 N. Y., 384. Yet if it appears that the defendant is informed of the fact of his being charged with the crime, and voluntarily gives his evidence it is admissible. *Teachout v. People*, 41 N. Y., 7.

THREATS MADE BY DEFENDANT.

It is well and firmly settled that it is competent to prove upon the trial of a person accused of the commission of murder, that he had, previous to the commission of such crime threatened to commit the offense imputed to him. *Cluck v. State*, 40 Ind., 263; 1 Green Cr. R., 734; *Stewart v. State*, 1 Ohio St., 66. And evidence of threats made two years previous to the commission of the offense. 5 Park. Cr. R. 522.

BY DECEASED.

On a trial of an indictment for murder, evidence of threat made by the deceased against the prisoner is admissible, even though such threats were unknown to the prisoner at the time of the homicide. *Holler v. State*, 37 Ind., 57; 10 Am. R. 74; *Cornelius v. Commonwealth*, 15 B. Monr., 539; *Campbell v. People*, 16 Ill., 18; *Keener v. State*, 18 Ga., 194. In *Stewart v. State*, 19 Ohio, 302, it was held competent for the defendant to prove that the person alleged to have been murdered, and others, had agreed to go to the house where the defendant boarded, for the purpose of quarreling with him. While in Iowa it is held that threats made by the deceased against the defendant, and not communicated to him, is not admissible. To this rule the only exception occurs where violent threats are made by the deceased a short time before the occurrence, and the question arises whether or not the defendant perpetrated the act in self defense. *State v. Elliott*, 4 Iowa, 436; uncommunicated threats are inadmissible. *Combs v. Frengan*, 44 Penn., 586; *Newcomb v. State*, 37 Miss., 383; *Powell v. State*, 19 Ala., 577; *Coker v. State*, 20 Ark., 53; *Atkins v. State*, 16 Ark., 568; *Gingo v. State*, 29 Ga., 470; *State v. Dumphrey*, 4 Minn., 438; *State v. Gregor*, 21 La. Ann., 473; *State v. Jackson*, 17 Miss., 544.

DEFENSE—INSANITY.

When a person is charged with a crime and admits the

commission of the act, but sets up the defense of insanity, the real ultimate question is, whether at the time of the act he had the mental capacity to entertain a criminal intent. If the reason and mental powers of the accused are either so deficient that he has no will, no conscience, or controlling mental power, or if through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible agent, and, of course, is not punishable for acts which otherwise would be criminal.

But experience and observation show that, in most of the cases which come before the courts, where it is sufficiently apparent that disease has attacked the mind in some form and to some extent, it has not thus wholly obliterated the will and mental power, but has left its victim still in possession of some degree of ability in some or all these qualities. It may destroy, or it may only impair and becloud the whole mind; or it may destroy, or only impair the functions of one or more faculties of the mind. Upon this important subject see *State v. Jones*, 50 N. H., 369; *Com. v. Rogers*, 7 Metc., 500; 16 Howell's St. Trials, 764; *Regina v. Oxford*, 9 C. & P., 525. In New York and Pennsylvania, in the two leading cases of *Freeman v. People*, 4 Denio, 9, and *Com. v. Mosler*, 4 Barr, 267, capacity to distinguish right from wrong was given as the naked test. But in neither of those states has the rule thus laid down been followed with uniformity. See, also, *People v. Kleime*, 1 Edm., Select Cases, 13; *State v. Spencer*, 1 Zab., 196. See, also, title "Insanity." Again it is said a man may be mad on all subjects, and then, though he may have a glimmering of reason, he is not a responsible agent. This is general insanity. It must be so great as entirely to destroy his perception of right and wrong. *Ortwein v. Com.*, 76 Penn. St., 414; 18 Am. R., 420; *Flanagan v. People*, 52 N. Y., 467. Also, see Am. Law Reg., U. S., Vol. 16, No. 8, p. 1.

BURDEN OF PROOF IS ON DEFENDANT.

The burden of proof of insanity is on the prisoner, and the jury must be satisfied that insanity existed at the time the act was committed. A reasonable doubt of the fact of insanity cannot be a ground of acquittal. *Ortwein v. Com.*,

76 Penn. St., 414; 18 Am. R., 420; *State v. Felter*, 32 Iowa, 49; 16 N. Y., 58; 3 Park. Cr. R., 272; 23 Ill., 283; 40 Ill., 352; 7 Iowa, 347; 18 Iowa, 435; 1 Park. Cr. R., 495; 32 N. Y., 147; 2 Park. Cr. R., 28.

While it is held in case of *State v. Crawford*, 11 Kansas, that it does not devolve upon the defendant to prove his insanity by a preponderance of evidence, but upon all the evidence, if there is a doubt he should be acquitted. Citing in support, *State v. Bartlett*, 43 N. H., 224-228; *Hopps v. People*, 31 Ill., 385; *Chase v. People*, 40 Ill., 224; *Polk v. State* 19 Ind., 170; *Stevens v. State*, 31 Ind., 485; *People v. Garbutt*, 17 Mich., 9; *People v. McCan*, 16 N. Y., 58; 1 Duval Ky., 224; 28 Ala., 693; 9 Am. Law Reg., 530; *People v. Robinson*, 1 Park. Cr. R., 649.

HABITUAL UNSOUNDNESS—PRESUMPTION.

Where habitual unsoundness of the mind is once shown to exist, it is presumed to continue to exist until the presumption is rebutted by competent proof, beyond a reasonable doubt. *State v. Reddick*, 7 Kan., 143.

HEREDITARY INSANITY.

It is competent to show hereditary tendency to insanity on the part of the defendant, and evidence of mental unsoundness on part of the brother or family is admissible. *People v. Garbutt*, 17 Mich., 9.

DEFENSE GENERALLY—BURDEN OF PROOF ON PLEA OF JUSTIFICATION.

On trial of an indictment for murder, the burden of proving that the homicide was excusable on the ground of self defense, rests on the defendant, and must be established by a preponderance of the evidence. *Silvus v. State*, 22 Ohio State, 90.

INTOXICATION AS A DEFENSE.

The voluntary drunkenness of a murderer neither excuses the crime nor mitigates the punishment. The rule is, that one in a state of voluntary intoxication is subject to the same rules of conduct, and to the same rules and principles of law, that a sober man is. *Shannahan v. Commonwealth*, 8 Bush., 463; 8 Am. R., 465; *Beasley v. State*, 50 Ala., 149; 20 Am. R., 292; 10 Am. Law Register, 577; 17 Mich., 9; 18 N. Y., 9; 31

N. Y., 330; 1 Park. Cr. R., 649; 6 Park. Cr. R., 209; 43 Calif., 344; 36 Ib., 531; 1 Green's Cr. R., 412; *State v. Bruce*, Western Jurist, Feb. No., 1878, page 106.

MENTAL UNSOUNDNESS BY REASON OF INTOXICATION.

While all crime implies some degree of intelligence in the criminal, the humanity of the law will not sanction the punishment of a person incapable of rational action. *United States v. McGlue*, 1 Curtis C. C. R., 1; 1 Leading Cr. Cases, 87. Drunkenness may be said to have two degrees in its effects upon the memory and discretion. The one of these is mere intoxication. No degree of this will palliate or excuse, where it is the effect of the voluntary act of the defendant. *State v. Bullock*, 13 Ala., 413. The other effect of drunkenness is mental unsoundness, brought on by excessive drinking, which remains after the intoxication has subsided. This latter mental unsoundness, if it exists to such excess that the accused loses the government of his reason, may be interposed as a palliation or excuse for the crime. *United States v. Drew*, 1 Leading Cr. Cases, 115. The unsoundness of mind which excuses a criminal act, must be of such degree as deprives the accused of the capacity to know right from wrong; short of this, it does not excuse. 4 Barr., 264; *Beasley v. State*, 50 Ala., 149; 20 Am. R., 292; *Blynn v. Commonwealth*, 10 Am. Law Register, 577; *People v. Eastwood*, 14 N. Y., 562; *People v. Rogers*, 18 N. Y., 9; 6 Park. Cr. R., 209; *State v. Bruce*, Western Jurist, Feb. No., 1878, page 106.

EVIDENCE OF INTOXICATION ADMISSIBLE.

Evidence of intoxication is admissible on trial for murder, because it may tend to cast light upon the act, observations or circumstances attending the killing. *Lanergan v. People*, 6 Park. Cr. R., 209; *People v. Rogers*, 18 N. Y., 9; *People v. Eastwood*, 14 N. Y., 562; *Gahagan v. Boston & Lowell R. Co.*, 1 Allen, 187; *Whitter v. Franklin*, 46 N. H., 23; *State v. Skinborn*, 46 N. H., 497; *State v. Pike*, 49 N. H., 399; 6 Am. R., 533; 1 Green's Cr. R., 412.

EVIDENCE OF INTOXICATION OF DECEASED.

On a trial for murder, evidence showing that the deceased was intoxicated at the time of the homicide is admissible to

show that he was incapable of attack or defense. *State v. Horne*, 9 Kansas, 119.

JUSTIFICATION.

In order to establish that a homicide was committed in self-defense, it is not essential that the defendant show that the deceased actually had a deadly weapon. It is sufficient in that respect if he show that the conduct of deceased was such as to induce a reasonable belief that he had one. *State v. Potter*, 13 Kansas, 414.

CHARACTER OF DEFENDANT.

Evidence of good character on the part of the defendant is always admissible and proper to be shown by him. *Harrington v. State*, 19 Ohio St., 264; *State v. Henry*, 5 Jones, N. C. R., 66; and, see title generally, "Character." *Fields v. State*, 47 Ala., 603; 1 Green's Cr. R., 635; 18 Ala., 720; 4 Park. Cr. R., 396.

CHARACTER OF DECEASED.

It is proper for the defendant to show the bad character and reputation of the deceased as a turbulent, quarrelsome man. *Franklin v. State*, 29 Ala., 14; *State v. Keene*, 50 Mo., 357; *Wise v. State*, 2 Kansas, 429; *People v. Murray*, 10 Cal., 309; *State v. Potter*, 13 Kansas, 414; *Hurd v. People*, 25 Mich., 405. But evidence of particular acts is inadmissible. *Eggle v. People*, 56 N. Y., 642; *Former v. People*, 4 Park. Cr. R., 558, and authorities cited; also, *Fields v. State*, 47 Ala., 603; 1 Green's Cr. R., 635; *State v. Abbarr*, 39 Iowa, 185; 1 Texas Court of Appeals R., 592; 43 Texas, 242.

This the State may rebut by showing that the character of the deceased was good in this respect, but not until there is an attack. *Bew v. State*, 37 Ala., 103; *Chase v. State*, 46 Miss., 707; *Pound v. State*, 43 Georgia, 128; *State v. Potter*, 13 Kansas, 414.

Nor is it competent to show the disposition or character of the deceased where the defendant does not claim that the act was done in self defense. *People v. Garbutt*, 17 Mich., 9; 7 Am. Law Register, 554.

JUSTIFICATION.

The mere trespass on another's premises is no justification, of itself, to take the life of another (*People v. Horton*, 4 Mich., 68), and constitutes no defense except in defense of one's own life, or that of his family, relatives or dependents, or in case of manifest danger of his life or great bodily harm. *Pond v. People*, 8 Mich., 151. And if the defendant, when threatened with immediate attack by an assailant, is authorized to act, his actions are to be judged from the circumstances as they appear to him at the time. *Pond v. People*, 8 Mich., 150; *Hurd v. People*, 25 Ib., 405. Nor are mere threats by the deceased admissible on the trial, for murder in justification or palliation of the homicide, unless in addition to such threats there was also at the time of the killing some attempt or demonstration by the deceased showing a present purpose and immediate danger of carrying such threats into execution, or of doing some bodily harm. *Harris v. State*, 47 Miss., 318; 1 Green's Cr. R., 601; see, also, *Pformer v. People*, 4 Park. Cr. R., 558, and authorities cited. So where the prisoner is pursued by a mob threatening his life and he was seeking to escape and in his flight was seized by some person whom he in self defense killed, and such person killed proves to be an officer seeking his arrest, it then becomes material for the prosecution to fix upon the prisoner, at the time of the killing, presumptive knowledge of the official character of the deceased. *Yates v. People*, 32 N. Y., 509. Where one believes himself about to be attacked by another and to receive great bodily injury, it is his duty to avoid the attack if in his power to do so, and the right of attack for the purpose of defense does not arise until he has done everything in his power to avoid its necessity. *People v. Sullivan*, 7 N. Y., 396. And the principle in taking one's life in self defense does not justify one in returning blows with a dangerous weapon when he is struck with the naked hand, and there is no reason to apprehend a design to do him great bodily harm. *Shorter v. People*, 2 N. Y., 193; see, also, *Stoffer v. State*, 15 Ohio St., 47. A bare trespass against the property of another, not his dwelling, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defense, and if he uses

such a weapon and kills the trespasser it will be murder, and this though the killing were actually necessary to prevent the trespass. *State v Vance*, 17 Iowa, on page 144.

PROVOCATION—ADULTERY OF WIFE.

Where a husband finding his wife in the act of adultery, strikes her with intent to kill, this is murder; to reduce the offense to the grade of manslaughter the blow must have been given in the heat of passion, and without intent to inflict death. *Shufflin v. People*, 62 N. Y., 229; 20 Am. R., 483.

EVIDENCE OF ONE CRIME TO PROVE ANOTHER.

Where the defendant was indicted for the murder of his wife by poison, and there being evidence of his criminal intimacy with the wife of S., on whose life was an insurance, it was held that evidence that S. died with the same symptoms as defendant's wife, and had been attended by defendant, was inadmissible. *Shaffner v. Commonwealth*, 72 Penn. St., 22; P. F. Smith, 60; 13 Am. R., 649.

TRIAL—DEGREE OF OFFENSES.

A prisoner cannot be put on trial for murder in the first degree on an indictment for murder in the second degree, though the evidence may sustain a conviction for the first degree. *Fouts v. State*, 4 G. Greene, 500; *State v. Tweedy*, 11 Iowa, 350; *State v. McCormick*, 27 Iowa, 402; *State v. Boyle*, 28 Iowa, 522; *State v. Knouse*, 29 Iowa, 118; *State v. Thompson*, 31 Iowa, 393; *State v. McNalley*, 32 Iowa, 581.

CONTINUANCE TO SPECIAL TERM DOES NOT VITIATE PROCEEDINGS.

A continuance to special term, at which a neighboring judge was to preside by interchange, when the prisoner was not present in court, though his counsel was, and consented thereto, is not regarded a sufficient error to reverse the judgment, when it appears that such continuance would have occurred by operation of law, on account of the previous connection of the presiding judge with the case. *State v. Linhart*, 23 Iowa, 314.

WHERE SAME ACT CAUSES DEATH OF TWO.

Where the same act results in the death of two or more persons, and the person committing the act is convicted of

acquitted on the trial of an indictment for the murder of one, he cannot be indicted for the murder of the other. *Clem v. State*, 42 Indiana, 420; 13 Am. R., 369. See generally "Former Adjudication."

For dying declarations, see title "Evidence."

NEGLECT OF DUTY BY OFFICERS.

SECTION 3965. When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision has been made for the punishment of such delinquency, is a misdemeanor. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA, } In District Court of . . . County, . . . term, 1878.
vs. }

Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of willful neglect of duty as a public officer, committed as follows: The said . . . , in the county of . . . , and State of Iowa, on the . . . day of . . . , 187 . . . did willfully and knowingly neglect his duty as a public officer in this, to-wit: That whereas a certain information was filed before one A B, a justice of the peace for Marion township, county and state aforesaid, by one B N, charging one M S with the crime of larceny, whereupon the said justice issued a warrant for the arrest of the said M S, and placed the same in the hands of S F, who was then and there a constable of said township, county and state, for service. That it then and there became the duty of the said S F by virtue of his office as such constable, to forthwith make service of said warrant as therein directed. And that the said S F, so being the constable of said township in said county, not regarding his duty in that behalf, but contriving and intending the due execution of justice to hinder and prevent, feloniously, unlawfully, willfully and corruptly did fail and refuse to execute the said warrant, and arrest the said M S named in said warrant, and charged with a criminal offense as aforesaid, as by the said warrant he was commanded, and as by law it was his duty to do, whereby and by reason whereof the said M S did then and there escape and go whithersoever he would, contrary to the duty of the said constable in that behalf, and to the manifest contempt and delay of justice, and against the peace and dignity of the state, and contrary to and in violation of law.

INDICTMENT, SUFFICIENCY OF.

An indictment against a constable for official negligence in not executing a warrant, must set out a warrant legal on its face, but need not aver that the steps required by the statute preliminary to its issue, as that a complaint was made, etc., were taken. *Stewart v. State*, 4 Blackf., Ind., 171.

NAME OF STATE.

The State is a person, within the meaning of the law, to whose injury an offense may be laid as having been committed. *Stewart v. State*, Ib., 171.

FAILING TO RETURN AN EXECUTION.

An indictment against a constable for failing to return an execution must state the substance, at least, of the execution. *State v. Smith*, 5 Blackf., Ind., 327.

AGAINST JUDGES OF ELECTIONS.

Where the defendants are charged with direliction of duty in not swearing in a voter who was about to vote, the indictment should aver that, under the law, it became the duty of the judges to administer such oath. In the following case the party who offered his vote was challenged; it then became the duty of the judges to administer an oath to such person, before he would be permitted to vote, and, under the Michigan statute, 1851, "If any officer on whom any duty is enjoined by law, relative to general, special, township or ward elections, or the canvassing or return of votes given at any election, shall be guilty of any corrupt conduct in the execution of the same, he shall be deemed guilty of a misdemeanor." The judges were compelled to administer the oath and this should have been set out in the indictment. *Wattles v. People*, 13 Mich., 447.

AGAINST A BOARD OF SUPERVISORS.

The indictment in the following case was against Conlee and others, and charged the defendants as "then and there being the supervisors of the county of W., in the State of Iowa, and being convened in session as the board of supervisors of said county, wrongfully, unlawfully and willfully, did order the erection of three several bridges within the limits of said county, at a cost exceeding the sum of \$5,000 each, and then and there wrongfully, etc., did appropriate, of the public money of said county, the sum of \$5,000 each for the erection of three several bridges within the limits of said county, and the further sum of \$5,000 each for the abutments and trestle-work on said bridges, without first submitting any proposition therefor to the legal voters of the county of W., contrary to and in violation of law." *Held*, that it was not necessary that the indictment should, by an express allegation, allege that the defendants voted for the order, and that the indictment was against the members thereof for their in-

dividual acts and not as a board and, therefore, good. *State v. Conlee*, 25 Iowa, 238.

The law upon which this violation was based, is found in sub-division 24 of section 303, page 51, Iowa Code, 1873, which is the same as section 312, sub-division 23, Rev. of Iowa, 1860, as amended by laws of 1870 and 1872, and is as follows: "That it shall not be competent for the board of supervisors to order the erection of a court house, jail, poor house, or other building or bridge, where the probable cost will exceed five thousand dollars, without first submitting such proposition to the voters of the county."

AS AGAINST DIRECTORS AND SCHOOL OFFICERS.

By section 21, of the school laws of Iowa, 1872, it is enacted, that the board of directors "shall audit and allow all just claims against the district, and fix the compensation of secretary, etc." The indictment charged that the defendants issued school orders to the amount of \$12,000.00, and that no buildings had been erected, but that it was with intent to squander and misappropriate the public moneys, etc. This indictment the court held bad, in that it did not aver that the claims for which the orders were alleged to have been given, were audited and allowed. *State v. Stiles and Shufelt*, 40 Iowa, 148.

There is no penalty or fine fixed in either of the sections cited, but that based upon section 3966, Code of Iowa, 1873: "When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor." Then the succeeding section 3967, provides, that when no punishment is prescribed for the violation of an act it shall be by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars.

AVERMENT OF OFFICIAL CHARACTER.

It is not necessary to allege or prove that each individual member was duly elected and qualified, and acting as such member in his official capacity. To allege that "the defendants then and there being the supervisors of the county of W., and being convened as the board of supervisors of said

county wrongfully," etc., is sufficient. *State v. Conlee*, 25 Iowa, 242.

ELEMENTS—LIABILITY—INDIVIDUALLY AND NOT OFFICIALLY.

The indictment should accuse the defendants by name, and individually, of the willful misconduct. They could not be guilty of the offense specified, except by their individual acts, and when in session as a board. While the defendants could not commit the offense charged, except when convened as a board each individual member is answerable only for his own act when thus convened. As it would take a majority of the members present to pass the order, it would follow that a minority could not be guilty of the act charged. *State v. Conlee*, 25 Iowa, 240.

DISTRICT ATTORNEY REFUSING TO ACT—WHEN LIABLE.

It is the duty of a district attorney to appear, in cases where the county is interested in his district; and a refusal would render him liable to an indictment under section 3965 cited herein. *Clark & Grant v. Lyon County*, 37 Iowa, 469. To the same effect, see *Muscatine Western Railroad Co. v. Horton*, 38 Iowa, 33.

NEGLECTING TO LABEL POISONS.

SECTION 4038. If any apothecary, druggist, or other person, sell and deliver any arsenic, corrosive sublimate, prussic acid, or any poisonous liquid or substance, without having the word "poison," and the true name thereof written or printed upon a label attached to the vial, box, or parcel containing the same, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. Any person who may dispose of at retail any poisonous substance or liquor to any one, for any purpose, is hereby required to enter in a book, to be kept by such apothecary, druggist, or other person so disposing, the name of the poison, when bought, by whom, and for what purpose; and if the person who calls for such poison is not personally known to the vendor, then such person shall be identified by some one known to the vendor, whose name shall also be entered in such book. Any failure to comply with the requirements of this provision shall subject the party so failing to imprisonment in the county jail not more than thirty days, or to a fine not exceeding one hundred dollars. [Limitation, by Sec. 4168, one year.]

Form of Information

THE STATE OF IOWA, }
vs. } Before . . . a justice of . . . county.

Information.

The defendant is accused of the crime of neglecting to label poison: For that the said . . . on the . . . day of . . . 1878, in the township of . . . county of . . . and State of Iowa, did unlawfully and knowingly, being then and there a druggist, sell and deliver to one A B, a certain two ounce vial containing corrosive sublimate, the same being a deadly poison, without having the same labeled or marked "Poison," contrary to and in violation of law. A. B.

STATE OF IOWA } ss.
COUNTY OF . . . }

I, A. B., being sworn, say that I heard the above information read over, and that the matters herein stated are true. A. B.

Subscribed and sworn to before me this . . . day of . . . 1878.

L. M., J. P.

NEGLECTING TO PROVIDE STEAM BOILERS WITH SAFETY VALVES, ETC.

LAWS OF 1874, CHAPTER 14, PAGE 12.

1. That it shall be the duty of any person owning or operating steam boilers in this State to provide such boilers with steam-gauge, safety-valve, and water-gauge, and keep the same in good order.
2. That any person neglecting to comply with the provisions of this act shall be deemed guilty of a misdemeanor, and shall be punished by fine of not less than fifty, nor more than five hundred, dollars.

NUISANCES AND ABATEMENT THEREOF.

SECTION 4089. The erecting, continuing, or using any building or other place for the exercise of any trade, employment or manufacture, which by occasioning noxious exhalations, offensive smells, or other annoyances becomes injurious and dangerous to the health, comfort, or property of individuals or the public, the causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others; the obstructing or impeding without legal authority the passage of any navigable river, harbor, or collection of water; or the corrupting or rendering unwholesome or impure the water of any river, stream or pond; or unlawfully diverting the same from its natural course or state to the injury or prejudice of others; and the obstructing or encumbering by fences, buildings or otherwise, the public highways, private ways, streets, alleys, commons, landing places or burying grounds, are nuisances.

SEC. 4090. If any person carry on the business of manufacturing gunpowder, or of mixing or grinding the composition therefor, in any building within eighty rods of any valuable building erected at the time when such business may be commenced, the building in which such business is thus carried on is a public nuisance, and such person is liable to be prosecuted accordingly.

SEC. 4091. Houses of ill fame kept for the purpose of prostitution and lewdness, gambling houses, or houses where drunkenness, quarreling, fighting or breaches of the peace are carried on or permitted, to the disturbance of others, are nuisances, and may be abated and punished as provided in this chapter.

SEC. 4092. Whoever is convicted of erecting, causing or continuing a public or common nuisance as described in this chapter, or at common law when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided, shall be punished by a fine not exceeding one thousand dollars, and the court, with or without such fine, may order such nuisance to be abated, and issue a warrant as hereinafter provided.

SEC. 4093. When, upon indictment, complaint or action, any person is adjudged guilty of a nuisance, the court before whom such conviction is had, may, in addition to the fine imposed, if any, or to the judgment for damages or cost for which a separate execution may issue, order that such nuisance be abated or removed at the expense of the defendant, and after inquiry into and estimating as nearly as may be the sum necessary to defray the expenses of such abatement, the court may issue a warrant therefor.

SEC. 4094. When the conviction is had upon an action before a justice of the peace and no appeal is taken, the justice, after estimating as aforesaid the sum necessary to defray the expenses of removing or abating the nuisance, may issue a like warrant.

SEC. 4095. Instead of issuing such warrant, the court or justice may order the same to be stayed upon motion of the defendant, and upon his entering into an undertaking in such sum and with such surety as the court or justice may direct, to the state, conditioned either that the defendant will discontinue said nuisance, or that within a time limited by the court, and not exceeding six months, he will cause the same to be abated and removed, as either is directed by the court; and upon his default to perform the condition of his undertaking, the same shall be forfeited and the court in term time or vacation, or justice of the peace, as the case may be, upon being satisfied of such default, may order such warrant forthwith to issue, and a *scire facias* on such undertaking.

SEC. 4096. The expense of abating a nuisance by virtue of warrant can be collected by the officer in the same manner; damages and costs are collected on execution, except that the materials of any buildings, fences or other things, that may be removed as a nuisance, may be first levied upon and sold by the officer, and if any of the proceeds remain after satisfying the expense of the removal, such balance must be paid by the officer to the defendant or to the owner of the property levied upon, and if said proceeds are not sufficient to pay such expenses the officer must collect the residue thereof.

LAWS OF 1876, CHAPTER 140, SECTION 4, LAST CLAUSE.

And the diverting, obstructing, impeding or filling up of such drains, ditches or water courses in any manner, by any person, without legal authority, is hereby declared a nuisance, and any person convicted of such crime, shall be punished as provided in title twenty-four, chapter fifteen of the Code, for the punishment of nuisances.

SEC. 4519. When the judgment is for the abatement or removal of a nuisance, or for anything other than the payment of money by the defendant, a certified copy of the entry of such judgment, delivered to the sheriff of the proper county, shall authorize and require him to execute such judgment, and he shall return the same with his doings under the same hereon indorsed to the clerk of the court in which the judgment was rendered, within seventy days after the date of the certificate of such certified copy, unless it be a judgment of imprisonment, which is hereinbefore provided for. [Limitation by section 4167, three years.]

For nuisance in erecting dams without "fish ways," see title "Seining and Destroying Fish."

Form of Indictment for Keeping Offensive Stock Yards.

THE STATE OF IOWA, } In District Court of . . . County, . . . term, 1878.
vs. } Nuisance.
. } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of nuisance, committed as follows; That on the . . . day of . . . , 1876, in the city of Marion, Linn county, Iowa, at and near divers public streets, to-wit: Market and Main streets, in said city and county, being the common highway, and also near unto dwelling houses of divers citizens of the said city, county and state, there situated, and being unlawfully and injuriously, did make, erect, set up, continue and use a certain enclosure, pen, or lot of ground, in which cattle and hogs were confined, fed, matured and retained, and the excrement, decayed food, slop and other filth retained upon and within said enclosure, which employment or use of said enclosure for said purpose, and permitting of said excrement, decayed food, slop and filth to remain upon and within said enclosure, occasioned noxious exhalations and offensive and unwholesome smells, so that the air was then and there greatly corrupted and infected thereby, and the noises made by the hogs at night becoming and being dangerous to the health, comfort and property of the people residing in that immediate neighborhood, and being a common

and a public nuisance to the people of the State of Iowa, there passing, repassing, being or residing, contrary to, etc.

This form is approved in *State v. Kaster*, 35 Iowa, 221.

Form of Indictment by Reason of the Erection of Mill Dams, etc.

That A B, at, etc., on the . . . day of . . . , 1876, being the owner and occupye^r of a certain mill dam and mill, with its appurtenances, situated near what is known as the Indian creek bridge, on the public highway leading from M to C, near the city limits of Marion, in said county, and near said highway and the dwelling houses of divers persons of said county, did, on the day aforesaid, and on divers other days and times between that day and the finding of this indictment, unlawfully and injuriously cause and permit the waters of said mill dam to overflow the adjacent lands of others as well as his own, by means whereof the mud, wood, leaves, brush, and the animal and vegetable substances and other filth collected and brought down the channel of said water course, there became and were, during all the time aforesaid, collected and accumulated in large quantities in the channel of said water course, and on the lands overflowed as aforesaid, by means of which the water in said mill dam and pond, and the mud, wood, brush, and animal and vegetable substances there collected as aforesaid, became, and were and still are offensive, impure and unwholesome, and the air became and still is corrupted and infected, to the injury of many citizens and the public generally, contrary to, etc.

The last form is substantially approved in *State v. Rankin*, 3 South Carolina, 438; 16 Am. Repts., 737; *State v. Close*, 35 Iowa, 570.

Form of Indictment under Section 4091.

That A B did keep a place and occupy the same as a saloon, in Marion, in said county and state, where drunkenness, quarreling, fighting, and other breaches of the peace were carried on, and, by the said A B, permitted to be carried on, to the disturbance of others, contrary to, etc.

Form of Indictment for Keeping a House of Ill Fame.

That A B did, on the . . . day of . . . , 1876, and on divers other days and times between the said . . . day of . . . , 1876, and the finding of this indictment, keep, and still continues to keep, a house of ill fame, for the purpose of prostitution and lewdness, to the disturbance of others, and to the common nuisance of the people of the State of Iowa, contrary to, etc.

This form is approved in *State v. Alderman*, 40 Iowa, 375.

Form of Indictment for Keeping Gambling Houses.

That A B did, on, etc., at, etc., and on divers other days and times between that day and the finding of this indictment, keep a place commonly called a saloon, resorted to for the purposes of gambling, and then and there did permit and suffer divers persons, to these grand jurors unknown, in said place, the same being under his control, to play at cards and other games, to the said jurors unknown, for money and other property, contrary to law, etc.

ELEMENTS CONSTITUTING NUISANCES.

It is a nuisance to obstruct a highway, though with a lawful business. *People v. Cunningham & Harris*, 1 Denio, 524. So the following acts and omissions of acts are nuisances: Keeping gunpowder insufficiently secured. *Myers v. Malcom*, 6 Hill, 292. Bowling alleys kept for gain or hire. *Tamer v. Albion*, 5 Hill, 121; 4 E. D. Smith, 570. Houses kept for the resort of people for immoral purposes. 1 Whart. Cr. Cases, 286. Causing water to stagnate and corrupt the air. *State v. Rankin*, 3 S. C. R., 438; 16 Am. Rep., 737. Keeping dogs which make unusual noises at night, or hogs and stock yards that become filthy. Roscoe's Cr. Ev., 794; *State v. Kaster*, 35

Iowa, 222. Under the Iowa Code, keeping intoxicating liquors with the intent to sell. *State v. Collins*, 11 Iowa, 141.

HOUSE OF ILL FAME.

The words "house of ill fame" as used in the statute, punishing the keeping thereof as a nuisance, will include a boat on a river when used as a habitation for such purposes. *State v. Mullan*, 35 Iowa, 199.

OBSTRUCTING HIGHWAYS BY RAILROADS.

Under the statutes of this state it is lawful for a railroad company to construct and maintain its railway upon any highway, and such fact does not render it liable to an indictment for nuisance; if improperly or negligently constructed, an indictment would lie. *State of Iowa v. Davenport & St. Paul R. R. Co.*, Western Jurist, April No., 1878, p. 217.

DEFENSES.

It is no defense that the building was remote from habitation, and that the prosecutors afterward erected buildings in its vicinity. *Taylor v. People*, 6 Park. Cr. Rep., 347.

The fact that the thing complained of is a great convenience to the public, is no defense. Roscoe's Cr. Ev., 794; *State v. Kaster*, 35 Iowa, 222.

BAR TO ACTIONS.

No length of continuance will legalize a nuisance. *People v. Cunningham & Harris*, 1 Denio, 524; *State v. Rankin*, 3 S. C., 438; 16 Am. Rep., 748; *Town of Stoughton v. Baker & Voss*, 4 Mass, 522; *Mills v. Hall & Richards*, 9 Wend., 317; Roscoe's Cr. Ev., 795.

DISORDERLY HOUSE.

Under section 4091, a conviction can be sustained, although the disorderly conduct did not take place in the house. *State v. Webb*, 25 Iowa, 235.

INDICTMENT.

Under section 4091, it is not necessary to allege that the defendant kept a house of ill fame *resorted to*, etc. The words "resorted to" apply to an indictment under section 4013. *State v. Alderman*, 40 Iowa, 375.

VARIANCE—LOCATION.

Where the indictment alleges a precise location, and proof varies from the allegation, whether or not this was a fatal variance, *quære*, the court being equally divided. *State v. Verden*, 24 Iowa, 126.

ALLEGING ACTS.

It is competent to allege the various acts which go to make up this offense. *State v. Spenebeck et al.*, Western J. March No., 1877, p. 170.

ABATEMENT GENERALLY.

If there is no averment of the continuing of the nuisance, the court cannot order an abatement, but only a peremptory judgment. *Munson v. People*, 5 Park. Cr. Rep., 16.

STOCK YARDS.

No order should be made to remove any fence surrounding the yards, but simply the filth within the same. *State v. Kaster*, 35 Iowa, 222.

MOTION TO HEAR EVIDENCE.

After a conviction, and before the order is issued to abate a nuisance, it is proper for the court to hear evidence, or to grant a motion, that the nuisance is abated. *Smith v. State*, 22 St., 539; *Matthews v. State*, 25 Ohio St., 536.

FINE—PUNISHMENT—ORDER OF REMOVAL—WHEN TO BE MADE.

The removal of the nuisance is not a necessary part of the punishment. It is left discretionary with the court. It is a power that may or may not be exercised; but when exercised it must be at the time of imposing the fine or imprisonment, and form a part of the same judgment. The power does not continue to exist after the defendant had been fined or imprisoned, as it would involve two distinct judgments, given at different times, for one and the same offense. *Cripps v. State*, 8 Michigan, 118.

FORMER ADJUDICATION AND ACQUITTAL.

It is competent for the defendant to show that former owners of a mill were indicted and tried for nuisance in keeping up the same dam, and acquitted, and that the question

ted, on the former trial, was whether the dam was a nuisance or not. Evidence that the dam was not a nuisance at that time is not, however, evidence that it has not since become such. *Crippen v. People*, 8 Michigan, 118.

CITY OR TOWN COUNCIL CANNOT ABATE WITHOUT JUDICIAL PROCEEDINGS.

An ordinance of a town declaring as a nuisance all intoxicating liquors kept within the limits of the town for the purpose of being sold, or given away, as a beverage to be drunk within said town, and directing the police officers to abate said nuisance by removing the liquors beyond the town limits, will not justify such officers in seizing and carrying away liquors until it has been determined by a court of justice that the ordinance has been violated. In this case, two police officers, under the direction of the council, and with two of its members, entered the plaintiff's, or prosecuting witness' house, and seized and carried away certain liquors, and then sought to defend under this ordinance. The court say: "Even concede the right of the council to pass such an ordinance, as to which we express no opinion, yet it certainly cannot be denied that such a power could be exercised only by some judicial instrumentality. As to whether the keeping of the liquors was for illegal sale, is a question which the owner had the right to submit to a court of justice, before his property could be taken away. The board had no more power to authorize their police officers to perform acts of this character, than they had to authorize them at discretion to assess a fine of fifty dollars upon any man whom they might believe to have violated the law, and seize his property, without an inquiry before a court, or an opportunity of being heard in his own defense. Such proceedings are a violation of the elementary principles of our constitution. A man's property cannot be taken except for a violation of law, and whether he has been guilty of such violation cannot be left to police officers or constables to determine." *Darst et al. v. People*, 51 Illinois, 286; 2 Am. R., 301.

OBSTRUCTING RAILROADS.

SECTION 3990. If any person or persons shall willfully and maliciously place any obstruction on the track of any railroad

in this state, or remove any rail therefrom, or in any other way injure such railroad, or do any other thing thereto, whereby the life of any person is or may be endangered, he or they shall be punished by confinement in the state penitentiary for life, or for any term not less than two years.

LAWS OF 1876, CHAPTER 148, PAGE 142.

SECTION 1. If any person shall throw any stone, or other substance, of any nature whatever, or shall present or discharge any gun, pistol, or other firearm at any railroad train, car, or locomotive engine, he shall be deemed guilty of a misdemeanor, and be punished accordingly.

SEC. 2. If any person not employed thereon, or not an officer of the law in the discharge of his duty, without the consent of the person having the same in charge, shall get upon or off any locomotive engine, or car of any railroad company, while said engine or car is in motion, or elsewhere than at the established depots of such company, or who shall get upon, cling to, or otherwise attach himself to any such engine or car, for the purpose of riding upon the same, intending to jump therefrom, when such engine or car is in motion, he shall be guilty of a misdemeanor, and be punished by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days. [Limitation to section 3990, by section 4167, three years, under the Laws of 1876, by section 4168, one year.]

THE STATE OF IOWA } In District Court of . . . county, . . . term, 1878.
VS. }

Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of willfully and maliciously obstructing a railroad track, committed as follows: That the said . . . on the . . . day of . . . 187 . . . in the county of . . . and State of Iowa, did willfully, maliciously, and feloniously tear up, remove and displace a part of the . . . railroad then and there situate and being, to-wit: one of the iron rails thereof, then and there being placed upon the track of said railroad for the passing over and upon said rail, of the locomotives, cars, and trains, then running upon said railroad, by which said tearing up, removing and displacing of the said rail, as aforesaid, he the said A B, did then and there, and thereby, willfully, maliciously, and feloniously cause the lives of divers persons, to these grand jurors unknown, who were then and there in and upon the locomotive and cars of a certain passenger train then and there running upon said railroad, to be endangered and put in great peril; there being immediate danger, then and there that said passenger train of cars then running upon said railroad would, by the tearing up, removing and displacing of said rail, as aforesaid, be thrown from the track of said railroad, to the great hazard and immediate peril of the lives of the persons being thereon as aforesaid, contrary to, etc.

Also, see form in title "Malicious Mischief, and Trespass on Property," under section 3979.

INDICTMENT, SUFFICIENCY OF.

An indictment, which charges and describes the offense in the language of the statute, is sufficient, though it does not set out the technical name of such offense. *State v. Hessenkamp*, 17 Iowa, 25; *State v. Clemens*, 39 Iowa, 257.

ALLEGATION OF ACTUAL OBSTRUCTION.

Under section 3979, Code 1873, as fully set out in title "Malicious Mischief, and Trespass on Property," it is not necessary to allege in the indictment, or prove upon the trial, that the obstruction, willfully or maliciously placed upon the track of a railway, actually *did* obstruct or hinder its trains. *State v. Clemens*, 39 Iowa, 257.

ELEMENTS—MALICE, WHEN IMPLIED.

When the consequences which would naturally follow any act, are criminal and mischievous, the law implies that the party acted with a malicious intent. *State v. Hessenkamp*, 17 Iowa, 25.

RINGING SIGNAL BELL.

In the following case the indictment charged that the defendant "feloniously, willfully, and maliciously, the engine and carriages of the property of the Boston and Providence Railroad Corporation, then and there lawfully passing over and along the railroad of said corporation, there located and situate, did obstruct, by then and there pulling the signal rope attached to and connected with the bell, in and upon the said engine, by reason whereof the said engine and carriages were then and there caused to be stopped, hindered and delayed, and the safety of divers persons then and there lawfully riding, passing and being conveyed on and upon the said railroad at West Roxbury aforesaid, in the county aforesaid, in and upon the engine and carriages aforesaid, then and there did endanger, contrary to etc." It was held that this did not constitute the crime of obstructing a railroad. The law was not intended to apply to a case where the train was stopped by an engineer, or other person, having control, in consequence of a false signal communicated in this manner by a passenger, and the act however improper, and whatever may have been the motive, cannot be regarded as ordinarily or directly dangerous to any one. *Commonwealth v. Killian*, 109 Mass., 345; 1 Green Cr. R., 192; 12 Am. R., 717.

EVIDENCE—ACCOMPLICE.

In a case of this character, like other cases, other corroboration than that tending to show the commission of the offense

is necessary to sustain a conviction based upon the testimony of an accomplice. *State v. Clemens*, 39 Iowa, 257.

DEFENSE—JUSTIFICATION.

The fact that the defendant owned the land over which a railroad passed, and had never released the right of way to the same, is no defense to a prosecution for placing obstructions on the track of such road at a point on his own land. So the breach of a contract, by which a railroad company has secured the right of way over certain lands, does not justify the owner in placing obstructions on the track of the railroad where it crosses his land. *State v. Hessenkamp*, 17 Iowa, 25.

It would seem from what is said in 39 Iowa, 257, above cited, that a prosecution for obstructing a railroad can be brought and maintained under section 3979 above referred to, as well as under the section herein fully set out.

OFFENSE AGAINST THE RIGHT OF SUFFRAGE.

SECTION 3993. If any person offer or give a bribe to any elector for the purpose of influencing his vote at any election authorized by law; and if any elector entitled to vote at such election receives such bribe, he shall be punished by fine not exceeding five hundred dollars, or imprisoned in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court.

SEC. 3994. If any elector unlawfully vote more than once at any election which may be held by virtue of any law of this state, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding one year.

SEC. 3995. If any person knowing himself not to be qualified, vote at any election authorized by law, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months.

SEC. 3996. If any person go or come into any county of this state, and vote in such county, not being a resident thereof, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding one year.

SEC. 3997. If any person willfully vote who has not been a resident of this state for six months next preceding the election, or who, at the time of the election, is not twenty-one years of age, or who is not a citizen of the United States, or who is not duly qualified from other disability to vote at the

place where, and time when the vote is to be given, he shall be fined in a sum not exceeding three hundred dollars, or imprisoned in the county jail not exceeding one year.

SEC. 3998. If any person procure, aid, assist, counsel or advise another to give his vote, knowing that such person is disqualified, he shall be punished by fine not exceeding five hundred dollars nor less than fifty dollars, and by imprisonment in the county jail not exceeding one year.

SEC. 3999. If any person furnish an elector with a ticket or ballot, informing him that it contains a name or names different from those which are written or printed therein, with an intent to induce him to vote contrary to his inclination, or fraudulently or deceitfully change a ballot of any elector, by which such elector is deprived of voting for such candidate or person as he intended, he shall be punished by imprisonment in the county jail not exceeding two years, and by fine not exceeding one thousand dollars nor less than one hundred dollars.

SEC. 4000. If any person unlawfully and by force, or threats of force, prevent, or endeavor to prevent, an elector from giving his vote at any public election in this state, he shall be punished by imprisonment in the county jail not exceeding six months, and a fine of not more than two hundred dollars.

SEC. 4001. If any person give or offer a bribe to any judge, clerk, or canvasser of any election authorized by law, or any executive officer attending the same, as a consideration for some act done, or omitted to be done, contrary to his official duty in relation to such election, he shall be punished by fine not exceeding seven hundred dollars, and imprisonment in the county jail not exceeding one year.

SEC. 4002. If any person procure, or endeavor to procure, the vote of any elector, or the influence of any person over other electors at any election, for himself, or for or against any candidate by means of violence, threats of violence, or threats of withdrawing custom, or dealing in business or trade, or enforcing the payment of debts, or bringing a suit or criminal prosecution, or any other threat of injury to be inflicted by him, or by his means, he shall be punished by fine not exceeding five hundred dollars, or imprisonment in the county jail not more than one year.

SEC. 4003. If any judge or clerk of any election authorized by law, knowingly make or consent to any false entry on the list of voters; or poll books; or put into the ballot box, or permit to be so put in, any ballot not given by a voter, or take out of such box, or permit to be so taken out, any ballot deposited therein, except in the manner prescribed by law; or by any other act or omission designedly destroy or change the

ballots given by the electors, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

SEC. 4004. When any one who offers to vote at any election is objected to by an elector as a person not possessing the requisite qualifications, if any judge of such election unlawfully permit him to vote without producing proof of such qualification in the manner directed by law, or if any such judge willfully refuse the vote of any person who complies with the requisites prescribed by law to prove his qualifications, he shall be punished by fine not exceeding two hundred dollars nor less than twenty dollars, or by imprisonment in the county jail not exceeding six months.

SEC. 4005. If any judge, clerk or executive officer designedly omit to do any official act required by law; or designedly do any illegal act in relation to any public election, by which act or omission the votes taken at any such election in any city, town, precinct, township or district, be lost, or the electors thereof be deprived of their suffrage at such election; or designedly do any act which renders such election void, he shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned in the county jail not more than one year, or by both fine and imprisonment at the discretion of the court.

SEC. 4006. If any judge, clerk or messenger, after having been deputed by the judges of the election to carry the poll-books of such election to the place where by law they are to be canvassed, willfully or negligently fail to deliver such poll-books within the time prescribed by law, safe, with the seal unbroken, he shall, for every such offense, be punished by fine not exceeding five hundred dollars, nor less than fifty dollars.

SEC. 4007. Any person who shall cause his name to be registered, knowing that he is not or will not become a qualified voter; in the township where his name is registered previous to the next election, or who shall wrongfully personate any registered voter, and any person causing, aiding or abetting any person in either of said acts, shall be deemed guilty of a felony, and punished for each offense by imprisonment in the state prison not less than one year. [Limitation, to all of the foregoing sections is, by Sec. 4167, three years.]

Form of Indictment for Bribing Electors under Sec. 3993.

THE STATE OF IOWA, } District Court of the County of term, 1878.
vs. }

Indictment.

The grand jury of the county of . . . in the name and by authority of the State of Iowa, accuse . . . of the crime of bribing electors, committed as follows: That on the . . . day of . . . , at the township of Marion, in the county of Linn, aforesaid, an election was duly holden, the same being authorized by the laws of the State of Iowa, and that A B and C D were severally candidates and voted for at

said election for the office of sheriff; and that one E F, then and there well knowing that said election was being holden, as aforesaid, and that said A B and C D were candidates and being voted for at said election, for the office of sheriff, as aforesaid, said . . . , on the . . . day of . . . , 187 . . . , in the county of . . . , and State of Iowa, did, unlawfully and corruptly, offer and give a large sum of money, to-wit: five dollars, to one G H, as a gift, bribe and reward, to corrupt, influence and procure the said G H, to give and cast his vote, at said election, so holden as aforesaid, to and for the said A B, candidate as aforesaid, for the office of sheriff, aforesaid, he, the said G H, then and there having and claiming to have, the right to vote at the election aforesaid, contrary to, and in violation of, law.

Form of Indictment under Section 3994—Voting more than once.

That said defendant on the . . . day of . . . , 1877, at and within said county and state, he, the said A B, then and there being an elector, resident and citizen of Marion township, said county and state, and there being held on said day a general election, authorized by the laws of the state of Iowa, for the purpose of electing state and county officers, said defendant then and there being such elector of said township and county, did offer and vote at said election for one E H, then and there a candidate for the office of sheriff, and did then and there, after having so voted once, again, on the said day and place aforesaid, offer his vote, and did then and there knowingly, willfully and unlawfully vote the second time for said E H, for sheriff, as aforesaid, contrary to, and in violation of, law.

Form of Indictment under Section 3995—Unqualified Voting.

[State when the election was held, what it was for, and whether it was a general, special, or municipal election.]

And that A B did then and there appear, at the said election, at the . . . township voting precinct, in the county of . . . , and did then and there unlawfully, knowingly, willfully and fraudulently vote, and give in his ballot to the judges of said election, and cause his name and vote to be entered by the clerks of said election on the poll books, and his ballot to be numbered and deposited in the ballot box of said election, the said A B not being then and there a qualified voter according to the constitution and laws of the state of Iowa, and then and there well knowing that he was not entitled to vote at said election, not having been a resident of the county aforesaid for six months, contrary to, and in violation of, law.

This same form may be used for sections 3996 and 3997 with slight changes.

Form of Indictment under Section 3998—Counselling one to vote when not qualified.

Under this section, after alleging what the election is, when and where held, continue thus: "The said defendant knowingly and unlawfully advised and counseled one E H to cast his vote at the election aforesaid, well knowing him, the said E H, to be an unqualified voter, contrary, etc."

Or, under section 3999. For deceiving voters:

[Commence as in the last above, by stating what kind of an election is being held, etc., and then say]: "And that one E F was then and there a qualified voter, legally entitled to vote at said election, at and in the Marion township voting precinct, in said county, and then and there desired and intended to vote and give in his vote for one G H, for the office of sheriff of said county, the said G H then and there being a candidate, and being voted for at said election, to fill said office of sheriff of said county, and that C D, then and there well knowing the premises aforesaid, but designing and intending him, the said E F, to deceive and defraud in the matter of his said vote, then and there unlawfully, designedly and fraudulently did give and furnish to the said E F a printed ticket, then and there representing to the said E F that said ticket contained the name of G H printed thereon, for the office of sheriff, whereas, in fact and in truth, the name of G H was not printed or written on said ticket for the office of sheriff, but instead thereof the said printed ticket contained the name of R S written thereon for said office, a person for whom the said E F did not design to vote, as the said C D well knew, he, the said C D, then and there, so as aforesaid, giving and furnishing to the said E F the said ticket aforesaid, for the purpose of causing the said E F to poll his vote contrary to his known wishes, and contrary to, and in violation of, law.

Form of Indictment under Section 4000—Preventing from voting by force or threats.

[State what the election is for, when and where held, and then proceed as follows:]

. . . did unlawfully, by threats, prevent one E G, who was an elector of said county and state, and who was about to vote, by then and there threatening to discharge the said E G of his employment in which he, the said E G, was then engaged for the said defendant, and the said E G did believe that if he would cast his vote at said election, as aforesaid, that the said defendant would discharge him from said employment, and by means of said threats did not vote, and by reason of such threats the said defendant is guilty of preventing said E H from casting his vote, contrary to, and in violation of, law.

Similar forms to the foregoing will answer for the remaining sections under this title, with the necessary alterations.

INDICTMENT—AVERMENT OF AUTHORIZED OFFICERS.

To charge that the defendant voted at an election authorized by law to be then and there holden, includes the further idea that it was held by the proper officers, and need not charge that said election was held by authorized officers. *State v. Douglass*, 7 Iowa, 414.

ALLEGATION OF DISABILITIES.

Under section 3995, "Voters knowing themselves not to be qualified," it is not necessary to allege the disqualification, or set forth what they were, in the indictment, while, under the next two sections, 3996, and 3997, it is necessary to allege what the disabilities were. *State v. Douglass*, 7 Iowa, 414.

JUDICIAL NOTICE.

The courts take judicial notice of the day upon which the general election for the current year is held, and of the officers to be voted for at such election. *State v. Minnick*, 15 Iowa, 124.

ALLEGATION OF CANDIDATES VOTED FOR.

It is not necessary to allege that certain candidates were voted for, or the names of the persons voted for. *State v. Minnick*, 15 Iowa, 124.

ALLEGATION OF DISABILITIES—INSUFFICIENCY.

Under section 59 (2 G. and H. 473), Laws of Indiana, "Any person, not having the legal qualifications of a voter, at any election authorized by law to be held in this state, for any officer whatever, who shall vote, or offer to vote at such election, shall be fined not less than five nor more than one hundred dollars." Under this law it is held that the indictment

should allege the qualification which the defendant lacked to make him a legal voter. *Quinn v. State*, 35 Indiana, 485; 9 Am. R., 754. To the same effect is *State v. Moore*, 3 Dutch, N. J., 105; *State v. Bruce*, 5 Oregon, 68; 20 Am. R., 734.

ELEMENTS—KNOWLEDGE—PRESUMPTION.

In the trial of an indictment under section 3997, Code of 1873, for "willfully voting when not a citizen of the United States," the court did not err in refusing to instruct the jury "that knowledge is not to be presumed in such case, but is to be alleged and proved, like any other fact," for the reason that the instruction was not pertinent. *State v. Sheeley*, 15 Iowa, 404.

VOTING IN A TOWNSHIP IN WHICH DEFENDANT IS NOT A RESIDENT.

The voting in a township of which the voter is not a resident is an offense. *State v. Minnick*, 15 Iowa, 125.

RESIDENCE, BONA FIDE.

To gain a residence in a township, within the meaning of the law, the elector must have the intention *bona fide* of making it his home. Remaining in the township with the intention to leave as soon as some temporary object is accomplished, does not establish a residence. *State v. Minnick*, 15 Iowa 124.

BRIBING VOTERS.

In a civil action, under the Oregon Code, section 354, for the purpose of having the respondent adjudged ineligible to hold the office of county judge, it is alleged "that at the election of 1874 there were two candidates, and that the respondent induced seventy voters to vote for him, upon the promise that if he was elected he would pay two hundred dollars of his salary into the county treasury." It was held, on demurrer, that the complaint was bad for not alleging that voters influenced by such offer were tax payers of the county. *State v. Church*, 5 Oregon, 375; 20 Am. R., 746. It is said in *State of Wisconsin, ex rel Newell, v. Purdy*, 36 Wis., 213; 17 Am. R., 485; *State v. Church*, 5 Oregon 375; 20 Am. R., on page 748: "In order to constitute the rewarding or the bribing of a voter, by a candidate for office, we do not think it essential that the candidate should pay the price agreed upon

for such vote directly into the hands of the voter in question; but the same results would follow the payment to a third person, or to an association or community of persons, if so made by the direction of the voter, and for his use and benefit."

EVIDENCE—ABSTRACT OF VOTES.

Whether it is necessary, where the state introduces the abstract of voters, to show that the persons who signed the abstract as judges of election were such judges, *quære*. *State v. Douglass*, 7 Iowa, 417.

IMPRESSION AND BELIEF OF DEFENDANT.

The fact that the defendant believed he had a right to vote, and made some inquiries in relation thereto, is inadmissible. *State v. Sheeley*, 15 Iowa, on page 407.

DEFENSE—ADVICE.

Evidence that the defendant received advice from his friends of his right to vote, they being no better informed than himself, is inadmissible. *State v. Sheeley*, 15 Iowa, on page 407.

COUNSEL.

Proof that the defendant received advice from counsel, and voted upon such advice is admissible. *State v. Sheeley*, 15 Iowa, on page 408; *Commonwealth v. Bradford*, 9 Metc., 268.

ILLEGAL VOTING—PERJURY.

The fact that the defendant was or is liable for perjury, as well as illegal voting, is no defense. *State v. Minnick*, 15 Iowa, 123.

OFFICER FAILING TO PERFORM DUTY.

SECTION 919. If any county auditor, or county treasurer, or other officer, shall neglect or refuse to perform any act or duty specifically required of him by any provision of this title, such officer shall be deemed guilty of a misdemeanor and indicted therefor; and, being found guilty, shall be fined in any sum not exceeding one thousand dollars, for the payment whereof his bondsmen shall also be liable; and he and his bondsmen shall also be liable to an action on his official bond for the damages sustained by any person through such neglect or refusal.

SEC. 1574. Any officer whose duty it is made to make

statement and publication as aforesaid, who shall willfully neglect, or refuse to do so shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not less than three months nor more than three years in the penitentiary.

SEC. 3030. The clerk willfully neglecting or refusing to perform any one of the duties in this chapter imposed, shall be liable to a penalty of five hundred dollars, and to damages to the party aggrieved, and shall be guilty of a misdemeanor in office, and on conviction thereof, shall be removed from office.

SEC. 3816. Any failure to pay over to the county treasurer witness fees as contemplated by this title, is a misdemeanor, and shall be prosecuted as provided by law.

SEC. 3840. Any officer who willfully takes higher or other fees than are allowed by law, is guilty of a misdemeanor, and may be fined therefor a sum not less than ten nor more than fifty dollars.

OFFICERS FAILING TO PAY OVER FEES.

SECTION 3970. If any justice of the peace, clerk of the district or other court, county recorder, or any other officer who by law is authorized to receive and required to pay over fees of office, or who is or may be authorized to impose or collect fines, shall fail, neglect, or refuse to pay over as prescribed or as may hereafter be prescribed by law, all such fees and fines, he shall be deemed guilty of a misdemeanor, besides being liable in a civil action for the amount of such fines and fees as he may have thus illegally withheld or appropriated.

SEC. 3971. If any justice of the peace, clerk of the district or other court which is now or may hereafter be established, county recorder, or other officer, who by law is authorized or required to keep a court docket, or who is or may be required to keep an account of fees or fines, and to pay over, or in any way account for the same, shall in any manner falsify such docket or account, or shall fail, neglect, or refuse to make an entry upon such docket, or account of such fees and fines, as are required to be paid over according to law, such justice of the peace, clerk of the district court, or clerk of any other court, county recorder and other officer shall be guilty of a misdemeanor, and shall be subject and liable to be prosecuted therefor in any court having jurisdiction of the offense.

SEC. 3972. Any justice of the peace, clerk of the district or of any other court which is or may be established, county

recorder, or other officer who may be found guilty of the offense of appropriating to his own use fees of office or fines collected for violation of law, or of neglecting to pay over the same as prescribed by law, shall be removed from office by the court before or by whom the offense may be tried and judgment or conviction had, and each and every person so found guilty shall be punished by a fine not exceeding three hundred dollars nor less than ten dollars, or imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment, in the discretion of the court.

SEC. 3973. All officers required by the provisions of this Code to collect and pay over fines and fees, shall, on the first Monday in January in each year, make report thereof under oath to the board of supervisors of the proper county, showing the amount of fines assessed and the amount of fines and fees collected, together with the vouchers for the payment of all sums by him collected, to the proper officer required to keep the same.

SEC. 3974. The clerks of the several courts of this state, except of the supreme court, and all mayors of incorporated towns and cities, and justices of the peace, shall, on the first Monday of January of each year, make a report in writing to the board of supervisors of their respective counties, of all forfeited recognizances in their several offices; of all fines, penalties, and forfeitures imposed in their respective courts, and which by law go into the county treasury for the benefit of the school fund; in what cause or proceedings, when, for what purpose, against whom, and for what amount rendered; whether said fines, penalties, forfeitures and recognizances have been paid, remitted, canceled, or otherwise satisfied; if so, when, how, and in what manner; if not paid, remitted, canceled, or otherwise satisfied, what steps have been taken to enforce the collection thereof, and the prospect of such collection. Such report must be verified under oath, to the effect that the same is full, true, and complete of the matters therein contained, and of all things required by this section to be reported; and any officer failing so to do shall be deemed guilty of a misdemeanor, and upon conviction thereof, may be fined in any sum not less than one hundred dollars.

SEC. 3975. If any notary public exercise the duties of his office after the expiration of his commission, or when otherwise disqualified, or appends his official signature to documents when the parties have not appeared before him, he shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than fifty dollars, and shall also be removed from office by the governor.

SEC. 3076. If any officer or person willfully fails to take the oath required by law before entering on the discharge of the duties of any office, trust, or station, or makes any contract which contemplates an expenditure in excess of the law under which he was elected or appointed, or fails to report to the proper officer showing the expenditure of all public moneys with proper vouchers therefor, by the time required by law, he shall be punished by a fine not exceeding five thousand dollars, or by imprisonment in the penitentiary not exceeding five years, or by both at the discretion of the court. [Limitation for all the above, by section 4167, three years, except section 3975, in which, by section 4168, the limitation is one year.]

Form of Indictment under Section 3970.

THE STATE OF IOWA, } In District Court of . . . County, . . . term, 1878.
vs. }
. } *Indictment.*

The grand jury in the county of . . . , in the name and by the authority of the state of Iowa, accuse . . . of the crime of failing and neglecting to pay over fees collected by him as a public officer, committed as follows: That the said defendant on the . . day of . . . , and up to the . . day of . . . was the duly elected and qualified recorder of Linn county, Iowa, and as such officer it became and was his duty to receive certain moneys for the recording of deeds, mortgages and other instruments; and that during the said period, to-wit, between the . . day of . . . and the . . day of . . . , the said defendant, by virtue of his office as aforesaid, received in such capacity of recorder certain sums of money amounting in the aggregate to five hundred dollars, in current money of the United States; that said A B, defendant as aforesaid, not regarding his duty as such recorder, but, afterward, on the . . day of . . . , at Marion aforesaid, county and state aforesaid, demand for the payment of the said money having been duly made by the treasurer of said county, the said A B then and there being required by law to pay over the said money to the said treasurer, and the said treasurer being then and there the proper officer and person to whom such payment ought, by law, to be made, fraudulently and unlawfully failed (or "refused") to pay over the said money to the said treasurer against the peace and dignity of the state and contrary to, and in violation of, law.

Similar forms may be used for offenses prescribed in the other sections above.

OFFICER FAILING TO RECORD OFFICIAL BOND.

SECTION 684. Any county officer who shall enter upon the discharge of the duties of his office, without first having caused his official bond to be recorded, shall forfeit to the county of which he is an officer, the sum of five dollars for each official act by him performed prior to the recording of said bond, and the chairman of the board of supervisors of each county is hereby required to bring suit for, or collect such penalty in the name of his county; and it shall be considered a misdemeanor for any officer who is required to give bond to act in such official capacity without giving such bond as is provided by law, and he shall be liable to a fine for an amount not exceeding the amount of the bond required of him.

OFFICER REFUSING TO SERVE PROCESS.

SECTION 3949. If any officer authorized to serve process willfully refuse to execute any lawful process to him directed, requiring him to apprehend or confine any person charged with, or convicted of, any public offense; or willfully delay or omit to execute such process, whereby such person escape, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both fine and imprisonment at the discretion of the court. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA } In District Court of . . . county . . . term, 1878.
VS. }

Indictment.

The grand jury of the county of Linn, in the name and by the authority of the State of Iowa, accuse . . . of the crime of neglecting and refusing to serve a process as a public officer, committed as follows: That on the . . . day of . . . 187 . . . A came before B, who was then and there a justice of the peace, in and for Marion township, in said county, and then and there made complaint, on oath, before the said C, justice of the peace, that one J N, then lately before, to-wit: on the . . . day of . . . at the county of Linn aforesaid, one bay mare the personal chattels of one H, of the value of one hundred dollars, then and there being found, feloniously did steal, take and carry away, against the peace and dignity of the State, then and there; and thereby charging the said J N with having committed the felony and crime of grand larceny. [Here insert the complaint showing the commission of the felony.] And that thereupon the said C, as such justice of the peace, then and there issued his warrant and legal process under his hand, commonly called a State warrant, in the words and figures following to-wit: [Here insert the warrant]. Directed to any constable of the said Marion township, in said county of Linn, reciting therein the aforesaid accusation against the said J N, and commanding the said constable forthwith to apprehend the said J N, and bring him before the said justice to answer the premises, and further to be dealt with according to law; which said warrant the said C., justice of the peace, as aforesaid, then and there delivered to E F, who was then and there a ministerial officer, namely, a constable of said Marion township, in said county of Linn, to be executed; and that the said E F, so being the constable of said township in said county, it became and was his duty as such constable, by law, to execute the said warrant, and lawful process, by forthwith apprehending the said J N, named in said warrant and charged with the said offense of grand larceny, and forthwith to bring him before the said justice to be further dealt with according to law, as by the said warrant he, the said E F, was commanded; and that the said E F afterward, on the day and year last aforesaid, at the county aforesaid, then being constable as aforesaid, not regarding his duty in that behalf, but contriving and intending the due execution of justice to hinder and prevent, feloniously and unlawfully, willfully, and corruptly, did fail and refuse to execute the said warrant and arrest the said J N, named in said warrant and so charged with the said criminal offense, as aforesaid, as by the said warrant he was commanded, and as by law it was his duty to do, by reason whereof, the said J N did then and there escape and go whithersoever he would, contrary to the duty of the said constable, in that behalf, and to the manifest contempt and delay of justice, and against the peace and dignity of the State of Iowa.

OFFICERS PROHIBITED FROM FURNISHING SUPPLIES.

AN ACT to prevent Trustees and other officers of State Institutions from Furnishing Supplies to or being Interested in Contracts with such institutions, and to Punish the Violation of the same.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That it shall be unlawful for any trustee, war-

den, superintendent, steward, or any other officer of any educational, penal, charitable or reformatory institution, supported in whole or in part by the state, to be interested directly or indirectly in any contract to furnish or in furnishing provisions, material, or supplies of any kind, to or for the institution of which he is an officer; and it shall be unlawful for any such trustee, warden, superintendent, steward, or other officer, directly or indirectly, to receive in money or any valuable thing any commission, percentage, discount, or rebate on any provision, material, or supplies furnished for or to any institution of which he is an officer. And it shall be unlawful for any such trustee, warden, superintendent, steward, or other officer of any state institution to be directly or indirectly interested in any contract with the state to build, repair or furnish any institution of which he may be an officer.

SEC. 2. Any person violating the provisions of section 1 of this act shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars, nor more than one thousand dollars, in the discretion of the court, or imprisoned in the county jail not exceeding one year, or both, such fine and imprisonment in the discretion of the court.

Approved, March 25, 1878.

OPPRESSION BY OFFICERS.

SEC. 3969. If any judge or other officer, by color of his office, willfully and maliciously oppress any person under pretense of acting in his official capacity, he shall be punished by fine not exceeding three hundred dollars, and imprisonment in the county jail not less than five nor more than thirty days, and be liable to the injured party for any damage sustained by him in consequence thereof. Limitation, by section 4167, three years.

Form of Indictment.

THE STATE OF IOWA, | In District Court of . . . County, . . . term, 1878.
vs. |

Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of willfully and maliciously oppressing another, under pretence of acting in an official capacity, committed as follows: That A B, on the . . . day of . . . , at Marion township, county and state aforesaid, being the constable of said township, did arrest and take into his custody one C D, by color of a certain warrant, commonly called a state warrant, which the said A B then and there alleged to have in his possession; and that the said A B, afterward, and while the said C D was in his custody, to-wit: on the day and year aforesaid, in the county aforesaid, in and upon the said C D did make an assault, and intending the duties of his said office to prostitute, and willfully and maliciously contriving and intending to oppress, injure, humiliate and harass the said C D, him, the said C D, without reasonable or justifiable cause therefor, and under color of his said office, as such constable, unlawfully and maliciously did then and there imprison and confine in a certain room, calaboose and prison house, in Marion aforesaid, for a long

space of time, to-wit: for the space of ten hours, the said prison and place of confinement being dirty, filthy, unhealthy and disagreeable, and wholly unfit and unsuitable as a place of imprisonment for a human being, as the said A B well knew, against the peace and dignity of the state, and contrary to, and in violation of, law.

PERJURY.

SECTION 3936. If any person on oath or affirmation, lawfully administered, willfully and corruptly swear or affirm falsely to any material matter in any proceeding in any court of justice, or before any officer thereof; or before any tribunal or officer created by law; or in any proceeding in regard to any matter or thing in or respecting which an oath or affirmation is or may be required or authorized by law, he is guilty of perjury, and shall be punished, if the perjury was committed on the trial of a capital crime, by imprisonment in the penitentiary for life, or any term not less than ten years; and if committed in any other case, by imprisonment in the penitentiary not more than ten years nor less than two years.

SEC. 3937. If any person procure another to commit perjury, he is guilty of subornation of perjury, and shall be punished as provided in the preceding section.

SEC. 3938. If any person endeavor to incite or procure another to commit perjury, though no perjury be committed, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail not more than one year. [Limitation, by section 4167, three years.]

DEFINITION.

Perjury is that, "When a lawful oath is administered by any one that hath authority, to any person in any judicial proceeding, who swears absolutely and falsely in any matter material to the issue or cause in question." 3 Institute, 164; 4 Bl. Com., 137; *People v. Fox*, 25 Mich., 496.

Form of indictment for perjury committed before a grand jury.

Form of Indictment.

THE STATE OF IOWA	}	In the District Court of . . . County, . . . term, 1878.
VS.		Perjury.
.		Indictment.

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of willful and corrupt perjury, committed as follows: That the said . . . on the . . . day of . . . 187 . . . in the county of . . . and State of Iowa, d.d. in a criminal investigation then pending before the grand jury of said county, wherein one . . . a justice of the peace of said county, was charged with oppression in office, which said matter the said grand jury then and there had lawful power and authority to investigate, and he, the said . . . then and there before said grand jury in due form of law, was sworn by . . . then and there being the foreman of the said grand jury, and took his corporal oath the truth to

· speak concerning the matters charged against the said . . . , he, the said . . . , foreman of the said grand jury, then and there having lawful power and authority to administer the said oath to the said . . . in that behalf, and the said . . . being so duly sworn as aforesaid, then and there upon his oath aforesaid, before the grand jury aforesaid, falsely, willfully, corruptly and feloniously did depose and swear in substance and to the effect following (here copy what was sworn to): whereas, in truth and in fact, the said . . . never at any time (here negative what was sworn to), as he, the said . . . well knew, which said matters so sworn to before the said grand jury by the said . . . were material in the investigation then going on before the said grand jury in reference to the charge of . . . by the said . . . , then and there being heard by the said grand jury. And so the grand jury of the county of . . . , in the name and by the authority of the State of Iowa, do say that the said . . . , on the . . . day of . . . , at, etc., before the grand jury of said county, by his own act and consent, in manner and form aforesaid, falsely, willfully, corruptly and feloniously, did commit willful and corrupt perjury.

This form is approved in *State v. Schill*, 27 Iowa, 263.

Form of indictment for perjury in a matter of the naturalization of a foreigner:

That on the . . . day of . . . , at the Circuit Court of said county of . . . , holden at the court house in Marion, in and for said county of . . . , by and before Hon. . . . , then Circuit Judge of the 8th judicial district of Iowa, one . . . , who was then and there an alien and subject of the government of Germany, and not a citizen of the United States, made application to said court, and made and filed and presented his declaration in writing and on oath in open court, of his intention to become a citizen of the United States in due form of law, and said Circuit Court had full power and jurisdiction and authority over the subject-matter of said application, and that the said . . . did then and there apply to and petition said court to be naturalized and to become a citizen of the United States, and that at the said Circuit Court, which was a court of record, on the said . . . day of On said petition and application, it then and there became a material question whether the said . . . had then and there resided within the limits and under the jurisdiction of the United States for five years then last past, and whether the said . . . , for one year then last past, had resided within the State of . . . , and whether, during the same period, the said . . . had behaved himself as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, and whether, at the time the said . . . arrived in the United States, he had attained his eighteenth year. And the jurors do further find and present, that the said defendant, at . . . , on the said . . . day of . . . , knowingly, unlawfully and feloniously contriving and intending, fraudulently, feloniously and unlawfully to procure the naturalization of the said . . . , an alien aforesaid, and to procure his admission as a citizen of the United States, came in his proper person before the said Circuit Court, to-wit: before the said . . . , sole circuit judge, and then and there in open court, the said Circuit Court having lawful and competent power and authority to administer oaths, and did then and there administer an oath to the said . . . ; after having been so duly sworn, did falsely, corruptly, knowingly and willfully depose and swear, among other things, in substance and to the effect following [here set out what the witness swore to]: whereas, in truth and in fact, the said . . . , at the time he took his oath as aforesaid, had no residence [negative what was sworn to], and whereas, the said . . . , at the time he so swore to and made the oath well knew the same to be utterly false and untrue. [Conclude as in form above.]

Form of indictment for perjury committed in a civil action before a justice of the peace:

That on the . . . day of . . . , at . . . , before J A, the said J A then and there being a justice of the peace of M, Linn county, Iowa, and being then and there duly authorized to execute the duties of the said office in a certain issue and cause then pending before said justice, said cause being between . . . as plaintiff and . . . as defendant, in which the issue was then and there tried in due form of law on the . . . day of . . . , and the said . . . was then and there, at said time and place, and produced as a witness for and on behalf of the said plaintiff, and was then and there sworn in due form of law, and did then and there take his corporal oath before the said . . . , justice as aforesaid, duly authorized to administer oaths, that the evidence which he, the said . . . , should give on the trial of the said issue between

the said . . . as plaintiff, and . . . as defendant, should be the truth, the whole truth and nothing but the truth; which oath was then and there duly administered to the said . . . by the said justice, the said . . . as such justice, then and there having jurisdiction over the subject-matter of the said issue and the parties thereto. And then and there, on the trial of the said issue, it became and was a material question whether or not, on or about the month of . . . , the plaintiff bought [here state the facts then in issue], and whether or not the said . . . was present and heard the said contract and conversations between the said . . . and . . . in relation to said purchase. Thereupon the said . . . being so produced and sworn as aforesaid, and being then and there lawfully required to testify and depose the truth on the trial of said issue, designing and intending to prevent the due course of justice, and to cause a judgment to pass and be rendered against the said . . . in said action, did then and there, before the said justice, as aforesaid, willfully and corruptly swear and give evidence on the trial aforesaid, falsely, amongst other things, in substance as follows [here insert evidence]: whereas, in truth and in fact, the said . . . was not present when the said . . . and the said . . . made the contract [here negative the material part]. And the jurors aforesaid, on their oaths aforesaid, do say that the said . . . , on the said . . . day of . . . , at and within the said county of Linn, before said justice, willfully, corruptly and knowingly did commit willful and corrupt perjury, contrary to, etc. Approved in *People v. Sweetman*, 3 Park. Cr. R., 358; *People v. Kinney*, *Id.*, 510; Wharton's Precedents of Indictments and Pleas, 2d Ed., 577.

Form of indictment for subornation of perjury:

That said defendant did, in a certain issue joined and then pending in the . . . Court of Linn county, Iowa, said court being then and there holden at M, wherein . . . was plaintiff and . . . defendant, in a certain action of replevin, and before the trial of the said issue, and while the same was pending, on the . . . day of . . . , at M, county and State aforesaid, unlawfully and willfully intending to pervert the due course of law, unlawfully, corruptly and maliciously did solicit, suborn, incite, procure, instigate and endeavor to persuade one . . . to be and appear as a witness on the trial of the said issue for and on behalf of the said . . . defendant in the said issue, and upon the said issue and trial to swear and give in evidence to and before the jurors who should be sworn to try said issue, certain matters material and relevant to the issue therein and thereby put in issue, in substance and to the effect following [here give the matters the witness is to swear to]: contrary to, etc.

And where perjury is committed, add a second count.

2d count.—And the jurors aforesaid, upon their oaths aforesaid, do further find and present, that in the . . . Court, in and for Linn county, and State aforesaid, at the said . . . Term held at M, and on the . . . day of . . . , before the Hon. . . . judge of said court, the issue aforesaid came on to be tried, and was then and there tried by a jury in that behalf, duly sworn and taken between the parties aforesaid upon which said trial the said . . . , in consequence and by the means and effect of the said corrupt subornation, did then and there appear as a witness for and on behalf of the said . . . , the defendant in the issue above named was then and there duly sworn before . . . , clerk of said . . . Court, under the direction and order of said . . . Court, that the evidence which the said . . . should give to the court then and there, and to the jury, touching the matters then and there in question between the parties, should be the truth, the whole truth, and nothing but the truth, the said . . . , clerk, having full power to administer the said oath to the said . . . in that behalf; and that at and upon the trial of the said issue so joined between the said parties, it then and there became a material question whether the said . . . [here state the question pending]. And the said . . . , being so sworn as aforesaid, falsely, corruptly and willfully before the jurors so sworn, and taken between the said parties as aforesaid, and before the said . . . , judge, did depose and swear, among other things, in substance and to the effect following, to-wit [here give the matters sworn to]: whereas, in truth and in fact, the said . . . [here negative the matters sworn to]. And whereas, in truth and in fact, the said . . . , at the time he so solicited, procured and suborned the said . . . falsely and corruptly to swear as aforesaid, well knew that the [here state the matters negatived]. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said . . . , on the . . . day of . . . , at . . . , did, unlawfully, corruptly and maliciously suborn and procure the said . . . to commit willful and corrupt perjury, in and by his oath aforesaid, before the said jurors so sworn and taken between the parties aforesaid, contrary to, etc.

INDICTMENTS—GENERAL AND SPECIFIC AVERMENTS.

A general charge of perjury is too indefinite. The indictment should set forth in what particular the perjury consisted of. *U. S. v. Morgan, Morris*, 341.

OFFICERS—COURTS—JUSTICES OF THE PEACE—JURISDICTION—SUBJECT-MATTER, AVERMENT OF.

It is held not to be necessary to allege that the case in which the perjury is charged to have been committed, was within the jurisdiction of the justice. *State v. Ledford*, 6 Iredell, N. C., 9; *Com. v. Knight*, 12 Mass., 275; *People v. Phelps*, 5 Wendell, 9; *Halleck v. State*, 11 Ohio, 400; *State v. Newton*, 1 G. Greene, 160; while it was held in *State v. Gallemore*, 2 Iredell, 374, that the facts should be clearly set forth, which show that the alleged false oath was taken in a judicial proceeding before a court of competent jurisdiction.

STATUTORY REQUIREMENTS—KNOWING THE FACTS TO BE FALSE.

Under statutes where the words "knowing the facts to be false" are incorporated in the indictment, should contain the word "knowing" and a failure to so allege is fatal to the indictment. *State v. Morse*, 1 G. Greene, 503.

ALLEGATION—WORDS "KNOW," "KNEW."

An averment that defendant "did know" is sufficient, and expresses the same as "knew." *State v. Wood*, 17 Iowa, 19.

KNOWING THE FALSITY OF THE MATTER—ALLEGATION OF.

An allegation that "the defendant knew" the falsity of the matter, is used where the assignment of the perjury is upon the statement by defendant of his belief, or denial of his belief of the alleged false matter. *State v. Raymond*, 20 Iowa, 583.

REQUISITES OF—IN PERJURY CASES.

It is essential to set out when and where the false testimony was delivered, so as to show that it was before a tribunal or officer created by law, and also to state with particularity the testimony, its falsity and materiality, but it is not necessary to allege that the party charged with the offense, in which the alleged perjury was committed, was or was not guilty. *State v. Schill*, 27 Iowa, 266.

OATH—PARTY OR COURT BEFORE WHOM TAKEN.

An indictment is not vulnerable to the objection that it does not charge the oath to have been administered by any one, but it is sufficient to charge that the defendant was duly sworn, or, that he was duly sworn and examined as a witness, or that he did take his corporal oath before said court. *State v. O'Hagan*, 88 Iowa, 504; 4 Zabriskie, N. J., 455; 10 Rich. Law, S. C., 165; *State v. Norris*, 9 N. H., 96; *Campbell v. People*, 8 Wendell, 636; Code, Sec. 4312; *People v. Phelps*, 5 Wendell, 9 and 271; *People v. Cook*, 4 Selden, 84; *Tuttle v. People*, 36 N. Y., 436.

MATERIALITY.

The indictment should set forth the materiality of the evidence given in the case on which the perjury is assigned. *Wood v. People*, 59 N. Y., 121; 2 Den. C. C. R., 241; *State v. Thriest*, 30 Ind., 211; *State v. Chandler*, 42 Verm., 446; • *Withers v. State*, 2 Blackf., Ind., 278; *Hoch v. People*, 3 Mich., 553; *People v. Fox*, 25 Ib., 493; *Gibson v. State*, 44 Ala., 17; Roscoe Cr. Ev., 7th ed., 826; 3 Cox C. C., 535; 2 Mo., 158; *Com. v. Knight*, 12 Mass., 274; *People v. Collier*, 1 Mich., 138; *People v. Gaige*, 26 Ib., 33; *Bryan v. State*, 1 Texas Court of Appeals, 620; 3 Greenleaf Ev., Sec. 189; *Hembree v. State*, 52 Ga., 242; 1 Am. Cr. R., 504; 116 Mass., 17.

MATERIALITY—CIRCUMSTANTIALLY.

If the matter falsely sworn to is circumstantially material, or tends to support and give credit to the witness in respect to the main fact, it is perjury. *Com. v. Pollard*, 12 Mass., 220; *Wood v. People*, 59 N. Y., 123; *Com. v. Pollard*, 12 Metcalf, Mass., 225.

MATERIALITY, ALLEGATION OF.

While it is true that it should appear on the face of the indictment that the evidence upon which the perjury is assigned was material to the question pending, it is not necessary to set forth so much of the proceeding as to show it to be so. A general allegation of materiality is sufficient. 5 Term, R., 319; 1 Ib., 64; *People v. Phelps*, 5 Wendell, 9; *People v. Warner*, 5 Ib., 272; *People v. Collier*, 1 Mich., 137; *Hoch*

v. People, 3 Ib., 554; *State v. Hall*, 7 Blackf., Ind., 25; *People v. Burroughs*, 1 Park. Cr. R., 223.

DATES OF THE COMMISSION OF OFFENSES.

The particular day or date need not be averred, as it is not material to set out the precise date. *Keator v. People*, 32 Mich., 487; 2 Park. Cr. R., 9. Contrary doctrine in *State v. Offutt*, 4 Blackf., Ind., 355.

COURTS OF COMPETENT JURISDICTION—POWER TO ADMINISTER OATHS, ALLEGATION OF.

It is sufficient to aver that the court had power to administer the oath, without setting forth the facts necessary to give jurisdiction. *Halleck v. State*, 11 Ohio, 400; *State v. Ellison*, 8 Blackf., Ind., 225.

CLERK—DEPUTIES, OATHS ADMINISTERED BY.

It is sufficient to aver that the oath was administered by a deputy clerk. *State v. Miller*, 2 Blackf., Ind., 35.

SUBORNATION OF PERJURY—KNOWING INTENT ON DEFENDANT'S PART.

In an indictment for subornation of perjury, it is necessary to aver that the defendant at the time he suborned the witness to take the false oath, knew it to be false, and that the witness is to give the testimony corruptly, or with a knowledge or belief of its falsity. *Stewart v. State*, 22 Ohio St., 477; 1 Green Cr. R., 527.

JURISDICTION—UNITED STATES AND STATE COURTS.

A State court has no jurisdiction of perjury committed on a false affidavit under the act of Congress relative to the sale of public lands. *State v. Adams*, 4 Blackf., 146.

PERJURY ASSIGNED ON NATURALIZATION PROCEEDINGS—STATE COURTS—JURISDICTION.

An affidavit or oath made in a proceeding of naturalization, if the same is false, is the subject of perjury, and the State courts have jurisdiction, although it may be also punishable under the laws of the United States. 30 Penn. St., 475; *State v. Whittemore*, 50 N. H., 245; 9 Am. R., 196; *Beavens' Case*, 33 N. H., 89; *Stephens' Case*, 4 Gray, 559. A

contrary doctrine is held in *People v. Sweetman*, 3 Park. Cr. R., 358.

UNITED STATES COMMISSIONER—PERJURY BEFORE.

The United States Courts only have jurisdiction of perjury committed before a United States Commissioner, as they derive their authority altogether from the United States. *State v. Whittemore*, 15 N. H., 83; 9 Am. Reps., 197.

PUNISHED TWICE FOR THE SAME OFFENSE (SEE FORMER ADJUDICATION)—ELEMENTS—MATERIALITY.

It is not essential to constitute perjury that the facts sworn to shall be material to the main issue. It is sufficient if it be material to a collateral issue before the court. 12 Mod., 142; 1 Hawkins, P. C., 320; 2 Bishop Cr. Law, S., 873; *Com. v. Pollard*, 12 Met., Mass., 225; *Pratt v. Price*, 11 Wend., 127; *Howard v. Sexton*, 4 N. Y., 157; *State v. Johnson*, 7 Blackf., Ind., 49; *State v. Lavalley*, 9 Mo., 824; *State v. Shupe*, 16 Iowa, 39.

ON A MOTION FOR CONTINUANCE.

While in a motion for a continuance each one of the essential parts becomes material, yet if the defendant states willfully false matters, which are material to the establishment of one of these parts, it is perjury, although the matters stated in relation to the other two parts, are wholly immaterial. *State v. Shupe*, 16 Iowa, 38; *Wood v. People*, 59 N. Y., 117; *State v. Johnson*, 7 Blackf., Ind., 49.

FALSE TESTIMONY BEFORE GRAND JURY.

Perjury may be committed by willfully giving false testimony of a material character before a grand jury. *State v. Fasset*, 16 Conn., 457; *Thomas v. Com.*, 2 Rob., Va., 795; 4 Blackf., 355; *State v. Schill*, 27 Iowa, 268.

MATERIALITY—PRESUMPTION.

To constitute the crime of perjury, the accused must willfully and corruptly swear, or affirm, falsely to any material matter, and such must be established by the evidence, and cannot be left to presumption or inferences to be exercised by the court or jury. *State v. Aikens*, 32 Iowa, 403.

IMMATERIAL MATTER.

A false oath upon an immaterial matter will not support a conviction for perjury. *Wood v. People*, 59 N. Y., 122; Roscoe's Cr. Ev., 7th ed., 826-7; *People v. Collier*, 1 Mich., 138; *State v. Hathaway*, 2 Nott & McCord, 118.

NATURALIZATION PROCEEDINGS.

Swearing to a false affidavit relative to an application thereafter to be made in a state court, for naturalization, under the laws of the United States is perjury. *State v. Whittemore*, 50 N. H., 245; 9 Am. R., 196; 3 Park. Cr. R., 358; *Rump v. Com.*, 30 Penn St., 475; *State v. Whittemore*, 50 N. H., 245.

ON INCOMPETENT AND IMMATERIAL EVIDENCE.

A party or witness can be guilty of perjury, although the evidence on which the perjury is assigned was legally inadmissible, or the witness was incompetent to give evidence. Having done so, he is amenable to the law. *Van Steenburgh v. Korts*, 10 Johnson, 167; *Pratt v. Price*, 11 Wendell, 128; *Chamberlain v. People*, 23 N. Y., 87; *Montgomery v. State*, 10 Ohio, 221.

CORRUPT MOTIVES.

Where a party, from corrupt motives, erased a signature of the subscribing witness to a deed, and procured the instrument to be recorded by falsely swearing that he was himself the subscribing witness, held to be perjury. *Tuttle v. People*, 36 N. Y., 431.

IMMATERIALITY—DEFENSE—CREDIT PLACED UPON FALSE EVIDENCE.

It is not important whether the false oath is credited or not, or whether the party against whom it is given is prejudiced thereby, for the prosecution is not grounded on the damage to the party, but on the abuse of public justice. 1 Hawk., P. C. C., 29 and 59; *Hoch v. People*, 3 Mich., 557.

PERJURY ASSIGNED ON AFFIDAVIT OF PLEADINGS—PLEADINGS NOT REQUIRED TO BE SWORN TO.

The swearing to a petition, not required by statute to be sworn to, is not the subject of perjury. It would apply, however, to petitions of replevin, attachments and cases where the

petition must be sworn to. *People v Fox*, 25 Mich., 492; *People v. Gaige*, 26 Ib., 30; 1 Green Cr. R., 524.

MARRIAGE LICENSE, OBTAINING—FALSE OATH.

The making of an affidavit or oath before an officer, in the issuing of a marriage license, if false, is perjury. *Call v. State*, 20 Ohio St., 330; and a deputy clerk has authority to administer such oaths. *Warwick v. State*, 25 Ib., 22.

MATERIALITY—TIME AND PLACE—ALIBI.

Time and place are material, and where the defendant swears to an alibi, if false, it is perjury. *State v. Lewis*, 10 Kan., 158.

WITNESS SWEARING WITH INTENT TO DECEIVE.

Where a witness with an intention to deceive the jury, swears so as to make an impression on their minds that a fact material in the cause is different from what it really is, and from what he knows it to be, he is guilty of perjury. *Scott v. Martzinger*, 2 Blackf., Ind., 454.

AFFIDAVIT, NOT ENTITLED IN A CAUSE OR COURT.

Perjury may be committed on a false affidavit, though not entitled in a cause or a court, if it appears from the body of the affidavit that it was taken in a judicial proceeding then pending. *Bremer v. Konig*, 5 Wis., 23, 156.

OATH ADMINISTERED BY CLERK OF COURT.

An oath administered by a clerk of the court, not required by law or by order of court, is extra-judicial, and, if false, is no foundation for perjury. *United States v. Babcock*, 4 McClean, U. S., 113.

PERJURY BEFORE A REFEREE.

Perjury can be committed in taking an oath before a referee, and it is immaterial as to whether the referee was duly qualified or not. 1 Park. Cr. R., 390. Perjury cannot be assigned on an oath by a judge of election who has not been himself sworn. Roscoe's Cr. Ev., Sec. 674; *Biggerstaff v. Com.*, 11 Bush., Ky., 169; 1 Am. Cr. R., 497. Where a trial before a referee was had, and an oath administered to the witness, the indictment should specify that the referee before whom the

oath was taken had authority to administer the oath, and also that the defendant swore falsely. *State v. Nickerson*, 46 Iowa, 447.

KNOWLEDGE OF FACTS—BELIEF.

Although the matters sworn to may be true, yet if it was not known to be so by the defendant it was perjury, inasmuch as he willfully swore that he knew a thing to be true, of which he knew nothing. *State v. Cruickshank*, 6 Blackf., 62; 3 Park. Cr. R., 516.

PERJURY ASSIGNED ON AN OATH TO A PROTEST OF A NOTARY PUBLIC.

Perjury cannot be assigned for a false oath to a protest taken before a notary public as part of the preliminary proofs in case of a marine loss, being a voluntary and extra-judicial proceeding. *People v. Travis*, 4 Park. Cr. R., 213.

DEFENSES—SEVERAL ASSIGNMENTS OF PERJURY IN SAME COUNT.

Where an indictment contains in the same count, several assignments of perjury some of which are good, and others are defective in form, or not sustained by proof upon the trial, a conviction can not be sustained, as the court would not know on what assignment of perjury the defendant was convicted. *Wood v. People*, 59 N. Y., 117.

INTOXICATION.

Intoxication is no defense to an indictment for perjury. *People v. Willey*, 2 Park. Cr. R., 19.

EVIDENCE GENERALLY—TWO WITNESSES—PROOF OF FALSITY.

The law does not require two witnesses to establish the giving of the testimony upon which the perjury is assigned. It requires two, however, to prove its falsity. *State v. Wood*, 17 Iowa, 19; *State v. Raymond*, 20 Ib., 586; 12 Metc., 225; 2 Whart. Am. Cr. Law, Sec. 2279.

For the necessary ingredients to constitute perjury, see "Instructions."

PERJURY ASSIGNED ON TESTIMONY GIVEN IN A CIVIL CASE.

Where the defendant in a civil action, pleads the statute of limitations, and is called as a witness by the plaintiff, under section 2742, Revision of 1860, which provides that the plain-

tiff may introduce the defendant and show by him, that the cause of action in which the defendant pleads the limitation act, still justly subsists, and where the defendant swears that the claim has no existence, it may be shown that he swore falsely in the civil action. *Sate v. Voght*, 27 Iowa, 117.

DEFENSE—ADVICE OF COUNSEL.

It is proper for the defendant to prove that he was advised by his counsel, upon the trial, in which the perjury was alleged to have been committed, such evidence might show that the defendant mistakenly supposed that certain facts existed. *Western Jurist*, Vol. 10, No. 1, page 21. *State v. McKenney*, 42 Iowa, 205.

ADVICE OF COUNSEL.

See, further, "Instructions."

PROOF OF FALSITY—TWO WITNESSES—WRITTEN EVIDENCE—CORROBORATION.

Evidence by one witness is not sufficient, unless otherwise supported, to convict of perjury; in that case there would only be one oath against the other. It does not seem to be actually necessary, however, to disprove the facts sworn to by two witnesses. It may be deemed sufficient by one witness, where strong circumstantial evidence corroborates that one witness. And such corroborating evidence may be established by written documents, such as books of account or letters of the defendant and the like. 14 Peters U. S., 440; 1 Leading Cr. Cases, 482; Hawkins, P. C., Vol. 2, Ch. 46, p. 91; 10 Mod., 193; Crown, C. C., 625-6. A letter written by the defendant contradicting his statement on oath would be sufficient to make it unnecessary to have a second witness. 6 Carr & Payne, 315; 2 Russell on Crimes, 649. There must be either two witnesses or one witness corroborated by material and independent circumstances. *Woodbeck v. Keller*, 6 Cowen, 119; 1 Phil. Ev., 112; 1 Chit. L. C., 563; 1 Leading Cr. Cases, 494; 2 Cushing, 222; 1 N. & McCord, 547; 1 Greanleaf Ev., Sec. 257; 2 Moody, C. C., 94; 8 Carrington & Payne, 737; 2 Ib., 607; *State v. Heed*, 57 Mo., 252; 1 Am. Cr. R., 502.

DYING DECLARATION OF WITNESS AS AGAINST A DEFENDANT.

On charge of perjury the dying declaration of a party to the

transaction, out of which the perjury arose, is not admissible. Such declarations are only admissible where the death is the subject of the charge. 2 Leading Cr. Cases, 234.

INSTRUCTIONS.

As to ingredients necessary in perjury, in the case of *State v. Raymond*, 20 Iowa, 586, the court instructed as follows: "To support an indictment for perjury the state must prove: 1st. The authority to administer the oath; 2d. The occasion of administering it; 3d. The taking of the oath by defendant; 4th. The substance of the oath; 5th. The materiality of the matter sworn to; 6th. The introductory averments of the indictment; 7th. The falsity of the matter sworn to; 8th. The corrupt intention of the defendant. And unless each and every one of these necessary elements of the crime of perjury is established to your satisfaction, and beyond a reasonable doubt, the defendant cannot be convicted. And while these instructions are approved, the court remarks, 'it might, perhaps, be questionable, whether the 'reasonable doubt' should not arise on the whole case, instead of any one element or more of the crime.'"

FACTS TO BE ESTABLISHED BY TWO WITNESSES.

The following instruction was approved: "The matter testified to must be established by evidence greater than that of one witness. Two witnesses, or one witness and strong corroborating proof, are required to establish the falsity of the matter alleged to have been sworn to by the defendant, on the trial before the justice of the peace, and the corroborative evidence must be of such a character, as to show in some degree the falsity of the matter sworn to by the defendant, or to convince the jury that such matter was false. But it is only in proof of the falsity of what you are satisfied that more evidence than that of a single unsupported witness is required." *State v. Raymond*, 20 Iowa, 586; *Crusen v. State*, 10 Ohio St., 268.

SUBORNATION OF PERJURY, HOW PROVED.

Subornation of perjury may be proved by the testimony of one witness. *Com. v. Douglas*, 5 Metcalf, 241.

ADVICE OF COUNSEL.

An instruction "that if the defendant made the proof pur-

suant to the advice of his counsel, believing that he might lawfully do so, the element of a corrupt intent would be wanting," or "if you believe it was arranged between the defendant and A, his attorney, that A should so advise for such purpose, then the advice would be of no avail as a defense," approved in *Tuttle v. People*, 36 N. Y., 438.

GOOD CHARACTER.

Testimony is competent to prove the good character of the defendant up to the time the indictment was found; but evidence of good character subsequent to that time is incompetent. *State v. Kinley*, 43 Iowa, 294.

PROHIBITORY LIQUOR LAW.

SECTION 1523. No person shall manufacture or sell, by himself, his clerk, steward or agent, directly or indirectly, any intoxicating liquors except as hereinafter provided. And the keeping of intoxicating liquor, with the intent on the part of the owner thereof, or any person acting under his authority, or by his permission, to sell the same within this state contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided.

SEC. 1524. Nothing in this chapter shall be construed to forbid the sale by the importer thereof, of foreign intoxicating liquor imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance with such laws; *provided*, that the said liquor at the time of said sale by said importer, remains in the original casks or packages in which it was by him imported, and in quantities not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages and in said quantities only; and nothing contained in this law shall prevent any persons from manufacturing in this state, liquors for the purpose of being sold according to the provisions of this chapter, to be used for mechanical, medicinal, culinary or sacramental purposes.

SEC. 1525. Every person who shall manufacture any intoxicating liquors as in this chapter prohibited, shall be deemed guilty of a misdemeanor, and shall pay, on his first conviction for said offense, a fine of one hundred dollars and the costs of prosecution, or shall stand committed thirty days, unless the fine be sooner paid; on his second conviction he shall pay a

ne of two hundred dollars, and the costs of prosecution, and shall stand committed sixty days unless the fine be sooner paid. And on the third and every subsequent conviction for said offense, he shall pay a fine of two hundred dollars and the costs of prosecution, and shall be imprisoned in the county jail ninety days.

SEC. 1526. Any citizen of the state, except hotel keepers, keepers of saloons, eating houses, grocery keepers and confectioners, is hereby permitted within the county of his residence to buy and sell intoxicating liquors for mechanical, medicinal, culinary and sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted, as follows.

SEC. 1527. He shall first procure a certificate signed by a majority of the legal electors of the township, town or ward, in which he desires to sell said liquors, that he is a citizen of the county and state, that he is of good moral character, and that they believe him to be a proper person to buy and sell intoxicating liquors for the purposes named in the preceding section.

SEC. 1528. He shall also make and file a bond, to be approved by the auditor of the county where application is made, in the sum of three thousand dollars, with two or more sureties, who shall justify in double the amount of said bond, conditioned that he will carry out the provisions of all laws now or hereafter in force relating to the sale of intoxicating liquors, and which said bond shall run in the name of the county for the benefit of the school fund.

SEC. 1529. Upon the presentation of such certificate and bond to the county auditor, a day shall be fixed by said auditor for the final hearing of the application by the board of supervisors, and notice thereof given by publication in at least one newspaper published in the county, or by posting such notice in the township, town or ward, in which the business is to be conducted. Such publication or posting shall be at least ten days prior to the time of final hearing, and the applicant shall pay the expenses thereof in advance.

SEC. 1530. At such final hearing, any resident of the county may appear and show cause why such permit should not be granted, and the same shall be refused unless the board shall be fully satisfied that the requirements of the law have, in all respects, been fully complied with, that the applicant is a person of good moral character, and that, taking into consideration the wants of the locality, and the number of permits already granted, such permit would be necessary and proper for the accommodation of the neighborhood.

SEC. 1531. Every permission so granted shall specify the house in which intoxicating liquors may be sold by virtue of

the same, and the length of time the same shall be in force, which in no case shall exceed twelve months.

SEC. 1532. The bond shall be deposited with the county auditor, and suit shall be brought thereon at any time by the district attorney, in case the conditions thereof, or any of them, shall be broken. The principal and sureties therein shall also be jointly and severally liable for all civil damages, costs and judgments that may be obtained against the principal in any civil action, brought by a wife, child, parent, guardian, employer or other person, under the provisions of sections fifteen hundred and fifty-six, fifteen hundred and fifty-seven and fifteen hundred and fifty-eight of this chapter. All other moneys collected on such bond shall go to the school fund of the county.

SEC. 1533. The account book of purchases and sales, from which the reports hereinafter mentioned are made, shall at all times be subject to the inspection of the district or circuit judge, district attorney, sheriff, or any constable or marshal, grand jurors, or of all justices of peace of the county, and such other persons as may be authorized by law to examine the same, and shall be produced by the party keeping the same, to be used as evidence on the trial of any prosecution against him, or against liquors alleged to have been seized from him or his house, on notice duly served that the same will be required as evidence.

SEC. 1534. Any permit procured or obtained under this chapter by any person not entitled to the same by the provisions hereof, shall be deemed fraudulent and void; and any one who, after obtaining such permit, shall enter upon or be engaged in any pursuit, in consequence of which he would not be eligible to obtain such permit, shall be deemed to have abandoned the same, and shall thereafter claim no protection thereby.

SEC. 1535. When any resident of the county shall file a written information, on oath, before any district judge, charging any one now holding, or who may hereafter hold, such privilege with violating the law, either by failing to keep a correct record of purchase or sale, or by making false entries in such record or account, or by selling colorably, and under pretense of complying with the law, but substantially in violation thereof, or when any sheriff, constable, or marshal of the county, shall, in his official character, make, sign, and file such written information, the district judge shall issue his notice to the accused, to appear before him in court, at the time fixed, to show cause why his permit shall not be vacated; and for the purpose of trial, either party may have witnesses summoned as in other cases. The defendant may answer the

complaint or charge, and the district court, either on default or on answer, or on finding any of the charges sustained by proof, shall revoke the permission to the party to sell liquor, and shall adjudge the defendant to pay the costs; and no person whose permission shall be revoked by the district court, shall be capable of holding such privilege again within this state for the space of two years thereafter.

SEC. 1536. When intoxicating liquor shall be seized under a search warrant by virtue of the laws now in force, it shall be no bar to the confiscation and destruction of the same, that the party claiming the same has a permit under this or any former law, if the court or jury trying the facts shall be satisfied from the proof that the defendant has sold such liquors in violation or evasion of law and at the time of the seizure had the liquors in question, with the intention of selling the same contrary to law, and any judgment of a competent tribunal condemning liquors seized under such warrant, from any person holding such permit, or convicting him of selling contrary to law, shall work a forfeiture of his privilege.

SEC. 1537. No person having a permit to sell intoxicating liquors under this chapter shall sell the same at a greater profit than thirty-three per cent on the cost of the same, including freights, and every person having such permit, shall make, on the last Saturday of every month, a return in writing to the auditor of the county, showing the kind and quantity of the liquors purchased by him since the date of his last report, the price paid, and the amount of freights paid on the same; also the kind and quantity of liquors sold by him since the date of his last report, to whom sold, for what purpose, and what price; also the kind and quantity of the liquors remaining on hand, which report shall be sworn to by the person having the said permit, and shall be kept by the auditor, subject at all times to the inspection of the public.

SEC. 1538. Any person having such permit, who shall sell intoxicating liquors at a greater profit than is herein allowed, or who shall fail to make monthly return to the auditor as herein required, or shall make a false return, shall forfeit and pay to the school fund of the county the sum of one hundred dollars for each and every violation of the provisions of this chapter, to be collected by civil action upon his bond by any citizen of the county, before any court having jurisdiction of the amount claimed, and for the second conviction under the provisions of this chapter the person convicted shall forfeit his permit to sell.

SEC. 1539. It shall be unlawful for any person to sell or give away, by agent or otherwise, any spirituous or other intoxicating liquors, including wine or beer, to any minor, for

any purpose whatever, unless upon the written order of his parent, guardian, or family physician, or to sell the same to any intoxicated person, or to any person who is in the habit of becoming intoxicated; and any person violating the provisions of this section shall forfeit and pay to the school fund the sum of one hundred dollars for each offense, to be collected by action against him and the sureties on his bond if one has been given, by any citizen in the county.

SEC. 1540. If any person, not holding such a permit, by himself, his clerk, servant, or agent, shall for himself, or any person else, directly or indirectly, or on any pretense, or by any device, sell, or in consideration of the purchase of any other property, give to any person any intoxicating liquor, he shall be deemed guilty of a misdemeanor, and shall pay, on his first conviction for said offense, a fine of twenty dollars and the costs of prosecution, and shall stand committed ten days, unless the same be sooner paid; on the second conviction for said offense, he shall pay a fine of fifty dollars and the costs of prosecution, and shall stand committed thirty days, unless the same be sooner paid, and on the third and every subsequent conviction for said offense, he shall pay a fine of one hundred dollars and the costs of prosecution, or shall be imprisoned in the county jail not less than three nor more than six months. And in default of the payment of the fines and costs provided for the first and second convictions under this section, the person so convicted shall not be entitled to the benefit of chapter forty-seven, title twenty-five of this code, until he shall have been imprisoned sixty days. All clerks, servants, and agents, of whatsoever kind, engaged or employed in the manufacture, sale, or keeping for sale, in violation of this chapter, of any intoxicating liquor, shall be charged and convicted in the same manner as principals may be, and shall be subject to the penalties herein provided. Indictments and informations for violations under this section may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged as on separate indictments or informations; but a separate judgment must be entered on each count on which a verdict of guilty is rendered. The second and third convictions mentioned in this section shall be construed to mean convictions on separate indictments or informations.

SEC. 1541. Any person who shall mix any intoxicating liquor with any beer, wine or cider by him sold, and shall sell, or keep for sale, as a beverage, such mixture, shall be deemed guilty under the preceding section, and shall be punished accordingly.

SEC. 1542. No person shall own, or keep, or be in any way concerned, engaged, or employed, in owning or keeping any intoxicating liquor with intent to sell the same in this state, or to permit the same to be sold therein in violation of the provisions hereof, and any person who shall so own or keep, or be concerned, engaged, or employed in owning or keeping such liquor with any such intent, shall be deemed guilty of a misdemeanor, and shall, on his first conviction for said offense, pay a fine of twenty dollars and the cost of prosecution, and stand committed until the same be paid. On his second conviction for said offense, he shall pay a fine of fifty dollars and the costs of prosecution, and stand committed until the same be paid, and on his third and every subsequent conviction for said offense, he shall pay a fine of one hundred dollars and the costs of prosecution, or shall be imprisoned in the county jail not less than three nor more than six months. And upon the trial of every indictment or information for violations of the provisions of this section, proof of the finding of the liquor named in the indictment or information in the possession of the accused in any place except his private dwelling house, or its dependencies, or in such dwelling house or dependencies if the same be a tavern, public eating house, grocery, or other place of public resort, shall be received and acted upon by the court as presumptive evidence that such liquor was kept or held for sale contrary to the provisions hereof.

SEC. 1543. In cases of violation of the provisions of either of the three preceding sections, or of section fifteen hundred and twenty-five of this chapter, the building or erection of whatever kind, or the ground itself, in or upon which such unlawful manufacture or sale, or keeping with intent to sell, of any intoxicating liquor is carried on, or continued, or exists, is hereby declared a nuisance, and may be abated as the law provides; and, in addition to the penalties prescribed in said section, whoever shall erect, or establish, or continue, or use any building, erection, or place for any of the purposes prohibited in said sections, shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, in the manner provided by law. And proof of the manufacture, sale, or keeping with intent to sell, of any intoxicating liquor, in violation of the provisions of this chapter, in or upon the premises described by the party accused, or by any other person under the authority or by the permission of the party accused, shall be presumptive evidence of the offense provided for in this section.

SEC. 1544. If any credible resident of any county, shall, before a justice of the peace for the same county, make writ-

ten information, supported by his oath or affirmation, that he has reason to believe, and does believe, that any intoxicating liquor described, as particularly as may be, in said information, is in said county, in any place described, as particularly as may be, in said information, owned or kept by any person named or described in said information, as particularly as may be, and is intended by him to be sold in violation of the provisions of this chapter, said justice shall, upon finding probable cause for such information, issue his warrant of search, directed to any peace officer in said county, describing as particularly as may be, the liquor and the place described in said information, and the person named or described in said information as the owner or keeper of said liquor, and commanding the said officer to search thoroughly said place, and to seize the said liquor, with the vessels containing it, and to keep the same securely until final action be had thereon; whereupon, the said peace officer to whom such warrant shall be delivered, shall forthwith obey and execute, so far as he shall be able, the commands of said warrant, and make return of his doings to said justice, and shall securely keep all liquors so seized by him, and the vessels containing it, until final action be had thereon; *provided, however,* that if the place to be searched be a dwelling house in which any family resides, and in which no tavern, eating house, grocery, or other place of public resort is kept, such warrant shall not be issued unless said complainant shall, on oath or affirmation, declare before said justice that he has reason to believe, and does believe, that within one month next before the making of said information, intoxicating liquor has been, in violation of this chapter, sold in said house, or in some dependency thereof, by the person accused in said information, or by his consent or permission; nor unless from the facts and circumstances disclosed by such complaint to said justice, the said justice shall be of opinion that said complainant has adequate reason for such belief.

SEC. 1545. The information and search warrant in such case shall describe the place to be searched, as well as the liquors to be seized, with reasonable particularity. When any liquors shall have been seized by virtue of any such warrant, the same shall not be discharged or returned to any person claiming the same, by reason of any alleged insufficiency of description in the warrant of the liquor or place, but the claimant shall only have a right to be heard on the merits of the case.

SEC. 1546. Whenever upon such warrant such liquors shall have been seized, the justice who issued such warrant shall, within forty-eight hours after such seizure, cause to be left at the place where said liquor was seized, if said place be

a dwelling house, store, or shop, posted in some conspicuous place on or about said buildings, and also to be left with or at the last known and usual place of residence of the person named or described in said information as the owner or keeper of said liquor, if he be a resident of this state, a notice, summoning such person and all others whom it may concern, to appear before said justice at a place and time named in said notice, which time shall not be less than five nor more than fifteen days after the posting and leaving of said notices, and show cause, if any they have, why said liquor, together with the vessels in which the same is contained, should not be forfeited; and said notice shall, with reasonable certainty, describe said liquor and vessels, and shall state where, when, and why the same were seized. At the time and place prescribed in said notice, the person named in said information, or any other person claiming an interest in said liquor and vessels, or any part thereof, may appear and show cause why the same should not be forfeited. If any person shall so appear, he shall become a party defendant in said case, and said justice shall make a record thereof. Whether any person shall so appear or not, said justice shall, at the prescribed time, proceed to the trial of said case, and said complainants, or either of them, may, and upon their default, the officer having such liquor in custody shall appear before said justice and prosecute said information, and show cause why such liquor should be adjudged forfeited. The proceeding in the trial of such case may be the same, substantially, as in cases of misdemeanor triable before justices of the peace, and if any person shall appear and be made a party defendant as herein provided, and shall make written plea that said liquor, or the part thereof claimed by him, was not owned or kept with intent to be sold in violation of this chapter, such party defendant may, at his option, demand a jury to try the issue, and, if upon the evidence then and there presented, the said justice or jury as the case may be, shall find for verdict that said liquor was, when seized, owned or kept by any person, whether said party defendant or not, for the purpose of being sold in violation of this chapter, the said justice shall render judgment that said liquor, or said part thereof, with the vessels in which it is contained, is forfeited. If no person be made defendant in manner aforesaid, or if judgment be in favor of all the defendants who appear and are made such, then the costs of the proceeding shall be paid as in ordinary criminal prosecutions where the prosecution fails. If the judgment shall be against only one party defendant appearing as aforesaid he shall be adjudged to pay all the costs of proceedings in the seizure and detention of

the liquor claimed by him up to that time, and of said trial. But, if such judgment shall be against more than one party defendant claiming distinct interests in said liquor, then the costs of said proceedings and trial shall be according to the discretion of said justice equitably apportioned among said defendants, and execution shall be issued on said judgments against said defendants for the amount of the costs so adjudged against them. Any person appearing and becoming party defendant as aforesaid, may appeal from said judgment of forfeiture as to the whole, or any part, of said liquor and vessels claimed by him so adjudged forfeited to the district court as in ordinary cases of misdemeanor.

SEC. 1547. Whenever it shall be finally decided that liquor seized as aforesaid is forfeited, the court rendering final judgment of forfeiture, shall issue to the officer having said liquors in custody, or to some other peace officer, a written order, directing him forthwith to destroy said liquors and vessels containing the same, and immediately thereafter to make return of said order to the court whence issued, with his doings endorsed thereon, and sworn to. Whenever it shall be finally decided that any liquor so seized is not liable to forfeiture, the court by whom such final decision shall be rendered, shall issue a written order to the officer having the same in custody, or to some other peace officer, to restore said liquor, with the vessels containing the same, to the place where it was seized, as nearly as may be, or to the person entitled to receive it, which order, the officer, after obeying the commands thereof, shall return to the said court with his doings thereon endorsed; and the costs of the proceedings in such case attending the restoration, as also the costs attending the destruction of such liquor in case of forfeiture, shall be taxed and paid in the same manner as is provided in case of ordinary criminal prosecution, where the prosecution fails.

SEC. 1548. If any person shall be found in a state of intoxication, he shall be deemed guilty of a misdemeanor, and any peace officer may, without warrant, and it is hereby made his duty to, take such person into custody, and to detain him in some suitable place, till an information can be made before a magistrate and a warrant issued in due form, upon which he may be arrested and tried, and, if found guilty, he shall pay a fine of ten dollars and the costs of prosecution, or shall be imprisoned in the county jail thirty days. But the magistrate before whom such person is tried and convicted may remit any portion of such penalty, and order the prisoner to be discharged upon his giving information, under oath, stating when, where, and of whom he purchased or received the liquor which produced the intoxication, and the name and char-

acter of the liquor obtained. In cases arising under this section, appeals may be allowed as in cases of ordinary misdemeanor within the jurisdiction of the justices of the peace. [This section is amended, law of 1874.]

SEC. 1549. In any indictment or information arising under this chapter, it shall not be necessary to set out exactly the kind or quantity of intoxicating liquors manufactured or sold, or kept for purposes of sale, nor the exact time of the manufacture, or sale, or keeping with intent to sell, but proof of the violation by the accused of any provision of this chapter, the substance of which violation is briefly set forth, within the time mentioned in said indictment or information, shall be sufficient to convict such person; nor shall it be necessary in any indictment or information to negative any exceptions contained in the enacting clause, or elsewhere, which may be proper ground of defense; and, in any prosecution for a second or subsequent offense as provided herein, it shall not be requisite to set forth in the indictment or information the record of a former conviction, but it shall be sufficient briefly to allege such conviction; nor shall it be necessary in every case to prove payment in order to prove a sale within the true meaning and intent of this chapter, and the person purchasing any intoxicating liquor sold in violation of this chapter, shall, in all cases, be a competent witness to prove such sale.

SEC. 1550. All payments or compensation for intoxicating liquor sold in violation of this chapter, whether such payments or compensation be in money, goods, land, labor, or any thing else whatsoever, shall be held to have been received in violation of law and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver in consideration of the receipt thereof, to pay on demand to the person furnishing such consideration the amount of said money or the just value of such goods, land, labor, or other thing. All sales, transfers, conveyances, mortgages, liens, attachments, pledges, and securities of every kind, which either in whole or in part shall have been made for or on account of intoxicating liquors sold in violation of this chapter, shall be utterly null and void against all persons in all cases, and no rights of any kind shall be acquired thereby, and no action of any kind shall be maintained in any court in this state for intoxicating liquors, or the value thereof, sold in any other state or country contrary to the law of said state or country, or with intent to enable any person to violate any provision of this chapter, nor shall any action be maintained for the recovery or possession of any intoxicating liquor, or the value thereof, except in cases where persons owning or possessing such liquor with lawful intent, may have been illegally deprived of the

same. Nothing, however, in this section shall affect in any way negotiable paper in the hands of holders thereof in good faith for valuable consideration, without notice of any illegality in its inception or transfer, or the holder of land or other property who may have taken the same in good faith, without notice of any defect in the title of the person from whom the same was taken, growing out of a violation of the provisions of this chapter, and all evidence given in actions brought by or against such holders, shall in no way be affected by the provisions of this section.

SEC. 1551. All peace officers shall see that the provisions of this chapter are faithfully executed, and when informed that the law has been violated, or when they have reason to believe that the law has been violated, and that proof of the fact can be had, such officers shall go before a magistrate and make information of the same and of the person so violating the law. Upon the filing of such information before a magistrate he shall institute a suit and proceed to the arrest, and trial thereof, according to law. Upon trials before a magistrate, it shall be the duty of the district attorney to appear for the state, unless the person filing such information shall select some other attorney. Any peace officer failing to comply with the provisions of this section, shall be guilty of a misdemeanor, and pay a fine of not less than ten nor more than fifty dollars, and a conviction shall work a forfeiture of his office.

SEC. 1552. The principal and securities in the bond mentioned in section fifteen hundred and twenty-eight and fifteen hundred and twenty-nine, shall be jointly and severally liable for all fines and costs that may be adjudged against the principal for any violation of any of the provisions of this chapter, and shall also jointly and severally be liable for all civil damages and costs that may be adjudged against such principal in any civil action authorized to be brought against him by the provisions of this chapter.

SEC. 1553. If any railway conductor, freight agent, expressman, depot master, or other person in the employment, or in any manner connected with any railway corporation, or any teamster, stage driver, or common carrier of any kind, or any person professing to act as agent for any other person or persons, whether within or without this state, or any other individual of whatever calling, shall bring within this state for any other person or persons, any intoxicating liquor, without first having been furnished with a copy of the certificate authorizing such person or persons to sell such intoxicating liquors, certified by some justice of the peace to be correct, such person or persons so offending, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, forfeit and pay a

fine for the first offense of twenty dollars, or be imprisoned in the county jail thirty days; for the second and each subsequent offense, shall forfeit and pay a fine of fifty dollars, or be imprisoned in the county jail ninety days.

SEC. 1554. Courts and jurors shall construe this chapter so as to prevent evasion, and so as to cover the act of giving as well as selling by persons not authorized.

SEC. 1555. Wherever the words intoxicating liquors occur in this chapter, the same shall be construed to mean alcohol and all spirituous and vinous liquors; *provided*, that nothing herein shall be so construed as to forbid the manufacture and sale of beer, cider from apples, or wine from grapes, currants, or other fruits grown in this state.

SEC. 1556. Any person who shall by the manufacture or sale of intoxicating liquors, contrary to the provisions of this chapter, cause the intoxication of any other person, shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and one dollar per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in a civil action before any court having jurisdiction thereof.

SEC. 1557. Every wife, child, parent, guardian, employer, or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, against any person who shall, by selling intoxicating liquors, cause the intoxication of such person, for all damages actually sustained as well as exemplary damages; and a married woman shall have the same right to bring suits, prosecute, and control the same and the amount recovered as if a single woman; and all damages recovered by a minor under this section, shall be paid either to such minor or his parent, guardian, or next friend, as the court shall direct, and all suits for damages under this section shall be by civil action in any court having jurisdiction thereof.

SEC. 1558. For all fines and costs assessed, or judgments rendered, of any kind, against any person for any violation of the provisions of this chapter, the personal and real property, except the homestead as now provided by law, of such person as well as the premises and property, personal or real, occupied and used for that purpose with the consent and knowledge of the owner thereof or his agent, by the person manufacturing or selling intoxicating liquors contrary to the provisions of this chapter, shall be liable, and all such fines, costs, or judgments, shall be a lien on such real estate until paid; and

where any person is required by sections fifteen hundred and twenty-eight and fifteen hundred and twenty-nine of this chapter to give a bond with sureties, the principal and sureties in the bond mentioned, shall be jointly and severally liable for all civil damages, costs, and judgments, that may be adjudged against the principal in any civil action authorized to be brought against him for any violation of the provisions of this chapter; *provided*, there shall be exempt such personal effects as may be necessary for the support of the family of defendant for six months, to be determined by the township trustees.

Sec. 1559. If any one purchasing intoxicating liquors of a person authorized to sell, shall make to such person any false statement regarding the use to which such liquor is intended by the purchaser to be applied, such person so obtaining such liquor shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, forfeit and pay a fine of ten dollars, together with costs of prosecution, or shall stand committed until the same is paid. For the second offense he shall pay a fine of twenty dollars and costs of prosecution, and be imprisoned in the county jail not less than ten nor more than thirty days.

ACTS OF FIFTEENTH GENERAL ASSEMBLY, LAWS OF 1874, CHAP. 37,
PAGE 29.

That section 1548, chapter 6, title 11 of the Code, be amended by adding after the word "obtained" in the fourteenth line the following words, to-wit: "Provided such intoxicated person gives bail for his appearance before a proper magistrate, court, or jury to give testimony in any action or complaint against the party furnishing such liquor."

Approved March 18th, 1874.

SALE OF LIQUORS NEAR "COLLEGE FARM."

Sec. 1620. No person shall open, maintain or conduct any shop or other place for the sale of wine, beer, or spirituous liquors, or sell the same at any place within a distance of three miles from the agricultural college and farm; *provided*, that the same may be sold for sacramental, mechanical, medical or culinary purposes; and any person violating the provisions of this section shall be punished, on conviction by any court of competent jurisdiction, by a fine not exceeding fifty dollars for each offense, or by imprisonment in the county jail for a term not exceeding thirty days, or by both such fine and imprisonment.

DISPOSING OF LIQUOR TO INDIANS AND INTOXICATED PERSONS.

SEC. 4044. If any person give, sell, or dispose of, any spir-
ituous or intoxicating drinks to any Indian within this state,
or to any person who is intoxicated, he shall be punished by
fine not exceeding two hundred dollars, or by imprisonment in
the county jail not exceeding one year, or by both fine and
imprisonment, at the discretion of the court. [Limitation, by
section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA, } In District Court of . . . County, . . . term, 1878.
vs. }

Indictment.

The grand jury of the county of . . . in the name and by the authority of the
State of Iowa, accuse . . . of the crime of selling liquors to an Indian, committed
as follows: The said . . . on the . . . day of . . . 187 . . . in the county of
. . . and State of Iowa, did, at and within said county, on the day aforesaid, un-
lawfully sell (or give) intoxicating drinks, to-wit: whisky, gin, rum and brandy, to
one L D, he, the said L D, being an Indian, (or to L D, the said L D being intox-
icated at the time), contrary to, and in violation of, law.

For selling liquor near religious societies see title, "Disturb-
ing Worshipping Congregations," section 4024.

PROHIBITING SALE OF BEER AND WINE, MALT
AND OTHER LIQUORS, WITHIN TWO MILES
OF ANY INCORPORATED TOWN OR CITY.

ACTS OF THE SEVENTEENTH GENERAL ASSEMBLY, LAWS OF 1878.

SECTION 1. *Be it enacted by the General Assembly of the
State of Iowa:* It is hereby made unlawful for any person, by
himself, his agent or employe, directly or indirectly, to sell to
any person ale, wine, beer, or other malt or vinous liquor,
within two miles of the corporate limits of any municipal cor-
poration; except at wholesale, for the purpose of shipment to
places outside of such corporation and such two mile limits,
except as hereinafter provided; and excepting further, that
when said two miles embrace any part of another municipal
corporation, that part so embraced within said other corpora-
tion shall not be held to be affected by this act, but shall re-
main, as heretofore, exclusively under the control of the cor-
poration within which it is situated.

SEC. 2. It is hereby made unlawful for any person, by him-
self, his agent or employe, directly or indirectly, to sell to any
person, and upon any pretext whatever, ale, wine, beer, or other
malt or vinous liquors, upon the day on which any election is
held under the laws of this state, within two miles of the place
where said election is held.

SEC. 3. The foregoing sections shall not be held to include the sale, by any person holding a permit therefor under the laws of this state, of said malt or vinous liquors, when said sale is made upon the prescription therefor of a practicing physician. The provisions of this section shall be a matter of defense in any prosecution under this act.

SEC. 4. The giving to any person of ale, wine, beer, or other malt or vinous liquor, in consideration of the purchase of any other property, shall be construed and held to be a sale thereof within the meaning of this act, and courts and jurors shall construe this act so as to prevent evasion.

SEC. 5. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and shall pay, on his first conviction for said offense, a fine of twenty dollars, and costs of prosecution, and shall stand committed five days, unless the same be sooner paid; on the second conviction for said offense, he shall pay a fine of fifty dollars and the costs of prosecution, and shall stand committed fifteen days, unless the same be sooner paid; and on the third and every subsequent conviction for said offense, he shall be punished by a fine of one hundred dollars, and shall pay the costs of prosecution, and shall stand committed for thirty days, if the same be not sooner paid, or by imprisonment in the county jail for thirty days.

SEC. 6. Any employe or agent of whatsoever kind, engaged or employed in selling, in violation of this act, shall be charged and convicted in the same manner as a principal may be, and shall be subject to the penalties and punishment in this act provided for such principal.

SEC. 7. Informations for violations under this act may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged as on separate informations; but a separate judgment must be entered on each count on which a verdict of guilty is rendered. The second and third convictions mentioned in this act shall be construed to mean convictions on separate informations. If the information does not otherwise indicate, it shall be held to be for a first offense.

SEC. 8. A conviction for a violation of the provisions of this act, shall, at the option of the landlord or his agent, be held to be a forfeiture of any lease of the real estate in or upon which such sale in violation thereof is made, and such landlord or his agent shall have the right at any time within thirty days from such conviction to institute a suit of forcible entry and detainer for the possession of said real estate, and shall recover

possession of such leased premises upon proof of the conviction of the tenant, his agent, servant, clerk, or any one claiming under him, of a violation of the provisions of this act, committed in or upon the said leased premises.

SEC. 9. The power and jurisdiction of every municipal corporation, whether acting under general or special charter, to regulate, prohibit or license the sale of ale, wine and beer, and of the courts and officers thereof to enforce said regulations, is hereby extended two miles beyond the corporate limits of said corporation.

Provided, That this section shall not be held to authorize said corporation to license any malt or vinous liquors, other than those malt or vinous liquors which said corporation, at this date, is authorized to license.

Approved March 25, 1878.

Form of Indictment for Nuisance in Liquor Cases.

THE STATE OF IOWA, } In District Court of . . . County, . . . term, 1878.
vs. }
. } *Indictment.*

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of a nuisance committed as follows: That the said . . . on or about the . . . day of . . . , 187 . . . , and on divers other days and times between the said . . . day of . . . , 187 . . . , and the finding of this indictment "did keep, use, and occupy a certain building commonly called a saloon, with intent to sell there, contrary to law, intoxicating liquors, to-wit: whiskey, gin, rum, brandy, and other intoxicating liquors, the names of which are to the jurors unknown, and then and there did sell the same contrary to law," etc.

Approved in *State v. Baughman et al.*, 20 Iowa, 497; *State v. Freeman*, 27 Iowa, 334; *State v. Schilling*, 14 Iowa, 456; *State v. Allen and Allen*, 32 Iowa, 248.

PROHIBITORY LAW CONSTITUTIONAL.

The provisions of the Code which prohibit the sale of intoxicating liquors, and which authorize proceedings *in rem* against "dram shops" are not unconstitutional, and should be enforced. *Our House*, No. 2, v. *State*, 4 G. Gr., 172; *Zumhoff v. State*, Ib., 526; *Santo et al. v. State*, 2 Iowa, 165; *Bryan v. State*, 4 Iowa, 349; *Geebrick v. State*, 5 Iowa, 491; *State v. Donehey*, 8 Iowa, 397; *State v. Beneke*, 9 Iowa, 205; *State v. Baughman*, 20 Iowa, 501; *State v. Bartmeyer*, 31 Iowa, 601.

INDICTMENT.

An indictment in liquor cases need not set out any proviso or exception, as this is a matter of defense. *Romp v. State*, 3 G. Gr., 276; *State v. Beneke*, 9 Iowa, 203; *State v. Collins*, 11 Iowa, 141; *State v. Becker*, 20 Iowa, 439; *State v. Stapp*,

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29 Iowa, 551; *State v. Curley*, 33 Iowa, 359; *State v. Jordan*, 39 Iowa, 387.

INTENT.

The indictment need not allege that the liquors were kept with the intent to sell in violation of law. *State v. Collins*, 11 Iowa, 14; *State v. Allen and Allen*, 32 Iowa, 248; *State v. Jordan*, 39 Iowa, 387.

TIME OF SELLING.

The precise time or date of sale is not necessary. It is sufficient if the time alleged is on any day within the statute of limitation and prior to the finding of the indictment. *State v. Malling*, 11 Iowa, 240; *State v. Layton*, 25 Iowa, 193.

DISTINCTION.

There is no distinction between "kept intoxicating liquor to sell," or "kept with intent to sell." *Vaughn v. State*, 5 Iowa, 369.

NAMES OF PARTIES TO WHOM LIQUORS WERE SOLD.

The names of persons to whom liquors were sold need not be set out in the indictment. *State v. Becker*, 20 Iowa, 438; *People v. Adams*, 17 Wend., 475.

NUISANCE—MANUFACTURE—SALE, OR KEEPING.

To charge either manufacturing, selling, or keeping with intent to sell, is held good; and charging all three does not vitiate the indictment. *State v. Baughman*, 20 Iowa, 498. The selling for any purpose whatever, without license from the board of supervisors is a violation, and any person using a building for this purpose constitutes a nuisance. *State v. Waynick*, 45 Iowa, 516.

PLACE OR BUILDING UNDER CONTROL OF DEFENDANT.

To charge "that a certain building was used by defendant as a place for the sale of intoxicating liquors, and that he did then and there keep intoxicating liquors for sale, in said building, with intent," etc., is sufficient, without stating that it was under his control. *State v. Schilling*, 14 Iowa, 455.

CONCLUSION OR TERMINATION OF INDICTMENT.

The fact that an indictment does not have a formal termi

nation will not vitiate it. To conclude, "to the common nuisance of all the people of said county, unlawfully," is sufficient. *State v. Schilling*, 14 Iowa, 455.

TIME OR PERIOD DURING WHICH THE NUISANCE IS CONTINUED.

It is not necessary that the indictment should show that the nuisance was continued up to, or existed at, the time the same was found. If the offense was committed about the time laid and within three years before the finding of the indictment, it is sufficient. *State v. Schilling*, 14 Iowa, 458.

SUFFICIENCY OF.

In an indictment for causing a nuisance, by selling, or keeping with intent to sell, it is not sufficient to merely charge that the defendant used and kept a place for the purpose of selling liquor, but should aver "that he either had sold liquors at the place mentioned, or kept them there for the purpose of selling." *State v. Hass*, 22 Iowa, 193; *State v. Harris*, 27 Iowa, 429.

CHARGING THE OFFENSE.

When an indictment charged a defendant "with the crime of nuisance," it was held to be sufficient to designate the name of the offense, when the language of the charging part of the indictment described the offense defined. *State v. Ansaeme*, 15 Iowa, 44.

LOCATION OF PREMISES—DESCRIPTION.

Where the indictment alleged, in describing the location, "Chambers'," instead of "Chamberlain's" store, it is not such a variance as will vitiate the indictment. *State v. Verden*, 24 Iowa, 126. And where the prosecution is against the person and not the building, the precise location need not be set out. *State v. Kreig*, 13 Iowa, 462; *State v. Schilling*, 14 Iowa, 455; *State v. Becker*, 20 Iowa, 438; *Zumhoff v. State*, 4 G. Greene, 526.

CHARGING TWO OFFENSES.

To allege that the defendant "kept intoxicating liquor for sale, and did then and there sell the same," does not charge two offenses. *State v. Becker*, 20 Iowa, 438; *Ib.*, 22 Iowa, 597; *State v. Boughman*, 20 Iowa, 497.

ELEMENTS CONSTITUTING A NUISANCE UNDER THIS CHAPTER.

Erecting and keeping a house for the sale of intoxicating liquor is an offense, and punishable under the Iowa law. *State v. McGrew*, 11 Iowa, 112; *State v. Collins*, 11 Iowa, 141; *State v. Little*, 42 Iowa, 51. But the sale of spruce beer is not a violation of the law. *Beekman v. State*, 4 Iowa, 452.

OWNER, CLERK OR SERVANT, SALE BY.

A sale, made by either the owner, clerk or servant, of liquors in violation of law, renders all alike liable for the sale; and, consequently, a clerk or bar tender may be indicted for a nuisance. *State v. Finan*, 10 Iowa, 19; *State v. Stucker*, 33 Iowa, 395; *Worley v. Spurgeon*, 38 Iowa, 465.

WINE, SALE OF ILLEGAL.

The sale of wine not made from fruit grown within this State is illegal, and comes within the provisions of this chapter. And the burden of proof rests upon the defendant to show that it was made of fruit so grown within this State, if he desires to avail himself of such defense. *State v. Stapp*, 29 Iowa, 551; *State v. Curley*, 33 Iowa, 359; *Worley v. Spurgeon*, 38 Iowa, 465.

SOCIAL CLUBS.

A person who acts as agent or employe of a social club, to keep and deal out its liquors to members purchasing and presenting tickets, may be indicted and punished for a violation of the prohibitory liquor law, under section 1563, Rev. 1860, and section 1542, Code of 1873. *State v. Mercer*, 32 Iowa, 405.

SALE OF, WHEN NOT A NUISANCE.

Where the defendant was a farmer, had neighbors living from half a mile to one and a-half miles distant, and raised grapes and made wine and sold it to parties who were required by him to take the same home or to some other neighborhood, but not to use it on the premises; and where several parties on their way home, at about a half a mile, drank the same and was noisy and boisterous, it was *held*, under Code, Sec. 4091, title, "Nuisance," the defendant was not guilty of a breach of the peace or keeping a disorderly house, as none of the wine

was drank on the premises. The parties who created the disturbance alone are guilty. *State v. Diffenback*, Western Jurist, May No., 1878, page 313.

JURISDICTION OF COURTS.

Since the adoption of Sec. 11, Art. 1, State Constitution of Iowa, in August, 1857, "All offenses less than felonies, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, should be tried summarily before a justice of the peace, on information, without indictment, or the intervention of a grand jury. So it is clear that under sections 1540 and 1542, Code of 1873, the District Court has not original jurisdiction to try and determine a cause where the charge is for selling, or owning and keeping liquors, and where the first and second penalties are sought to be enforced within the meaning of the provisions of said two sections, as they are within the jurisdiction of a justice of the peace to try and determine. The District Court has only an appellate jurisdiction of such cases, but has exclusive jurisdiction of the third offense named in said sections, the imprisonment on conviction being, if at all, not less than three months. *Walters v. State*, 5 Iowa, 507; *State v. Koehler*, 6 Iowa, 398; *State v. Shawbeck*, 7 Iowa, 322. A justice of the peace has jurisdiction of the crime of selling intoxicating liquors. *State v. Silhofee*, Western Jurist, June No., 1878, page 379.

EVIDENCE—EXAMINATION OF WITNESSES.

To ask a witness, "State whether at any time, within three months prior to December 17th, 1873, you knew of the defendant selling any intoxicating liquors to any party within this county," or, "State whether, at any time within one year prior to the 17th day of December, 1873, within this county, you knew of the defendant, Moses R., selling any intoxicating liquors to any party," is held to be proper. *State v. Roben*, 39 Iowa, 424. Or, "What have you seen by way of liquors being sold between certain dates," is held proper. *State v. Schilling*, 14 Iowa, 456.

LEADING QUESTIONS.

To ask, "How do these bitters answer the purpose, and compare in effect, with the purposes for which whisky is generally

used, and for which you used it, and the effects produced by drinking of the article commonly called whisky," held to be proper. *State v. Bodekee*, 34 Iowa, 521. But to ask whether witness bought liquor for the purpose of informing on defendant is improper. *Devin v. State*, 4 Iowa, 444.

PROOF AS TO INTOXICATING QUALITIES.

To sustain a conviction for selling wine, made from fruit grown out of this State, the prosecution need not prove that the liquor was intoxicating. *State v. Curley*, 33 Iowa, 359.

EVIDENCE OF SALE—PRESUMPTION.

Proof that the defendant sold intoxicating liquors in violation of the act, is deemed sufficient, as presumptive evidence of the offense of nuisance. *State v. Boughman*, 20 Iowa, 82, 228, 497; *State v. Freeman*, 27 Iowa, 333; *State v. Munzenmaier*, 24 Iowa, 87. But it is not sufficient to merely show that defendant occupied or used a building with intent to sell, but that he had actually sold, or kept them there for that purpose. *State v. Hass*, 22 Iowa, 193; *State v. Harris*, 27 Iowa, 429.

QUANTUM OF PROOF—OCCASIONAL SALES.

Proof of occasional sales, in a secret manner, without testimony that the place was notoriously, or publicly known as a place for the sale of intoxicating liquors, is sufficient to convict, in a prosecution for nuisance. *State v. Freeman*, 27 Iowa, 334.

But a party cannot be convicted of the unlawful sale of intoxicating liquors upon the sole testimony of one in his employ that the witness upon one occasion sold to a purchaser a small quantity of liquor, without specifying in his testimony that it was the property of his employer or that the latter had any such liquor in his possession. *State v. Findley*, 45 Iowa, 435.

PROOF OF PRECISE TIME AND DATE UNNECESSARY.

In a prosecution for selling liquor, the time of selling need not be proved as laid in the indictment. *State v. Layton*, 25 Iowa, 193; *State v. Curley*, 33 Iowa, 359. Where the indictment charges the sale to have been made on the 15th, evidence

is admissible to show that it was on the first of the month. *State v. Baughman*, 20 Iowa, 497.

PRICE PAID FOR LIQUOR IMMATERIAL.

The price, or amount of consideration that the liquor was sold for, is immaterial. *Clare v. State*, 5 Iowa, 509.

AFTER VERDICT, IN AGGRAVATION.

Whether evidence in aggravation of the offense, may be introduced after verdict, "*quære*." If introduced it is not ground for reversing the judgment and would only be considered by the Supreme Court for the purpose of reducing the penalty if excessive. *State v. Little*, 42 Iowa, 51.

FINDING LIQUOR IN BUILDING OTHER THAN PRIVATE DWELLING—PRESUMPTION.

The finding of intoxicating liquor in any other building than one used as a private dwelling affords presumptive evidence that they are kept by the owner for sale, and will support an indictment for "keeping and maintaining a house for selling intoxicating liquors." *State v. Norton*, 41 Iowa, 430.

FINDING ON PREMISES, EFFECT OF.

The simple fact of finding liquor in the back yard of defendant's premises, without evidence as to whom it belonged, is not, of itself, sufficient to convict on a charge of keeping with intent to sell. *Garretson v. State*, 4 Iowa, 339.

LANDLORD AND TENANT—LIABILITY.

Where the tenant sells, or keeps with intent to sell, liquors, the landlord is also liable to indictment, if he leased the premises to the tenant for that purpose, or if the tenant kept or sold the liquor by his authority or permission. *State v. Potter*, 30 Iowa, 587; *State v. Bailey*, 31 Iowa, 598. But the landlord is not held liable, if he lease the premises for a lawful purpose, and did not affirmatively assent to such unlawful use. The mere failure to prevent or to attempt to prevent the illegal use or sale of the liquors, does not subject him to the penalties of the statute. *State v. Ballingall*, 42 Iowa, 87.

DEFENSES—U. S. LICENSE NO DEFENSE.

The fact that the defendant has a United States license, is no defense. Such a defense is only permitted in states where the

sale of intoxicating liquor is permitted. *State v. Carney et al.*, 20 Iowa, 83; *State v. Stutz*, 20 Iowa, 488; *State v. Boughman*, 20, Iowa, 497.

LICENCE BY CORPORATION.

A license granted by a corporation for the sale of intoxicating liquors is of no validity, nor is it a good defense. *State v. Harris*, 10 Iowa, 441.

PENALTY—FINE, AMOUNT OF.

It is not necessary to show the prosecution to be other than the first conviction, as under an indictment for "Nuisance," the court is not limited to twenty dollars for the first offense. But the fine may be up to one thousand. *State v. Munzenmaier*, 24 Iowa, on page 91; *State v. Winstrand*, 37 Iowa, on page 114. And under chapter 69, Laws of 1870, Sec. 4736 to 4743, inclusive of Code of '73, if the court made a special order that the defendant shall labor, he is entitled to a credit on his judgment of one dollar and fifty cents for every day he so labors. And this applies to convictions for violations of the prohibitory liquor law, as well as to other convictions. *State v. Windstrand*, 37 Iowa, 110. And if the defendant be fined only, and imprisoned for failing to pay the fine, the extent of his imprisonment shall not exceed one day for every three and one-third dollars of the fine. Code, 1873, Sec. 4509; *State v. Jordan*, 39 Iowa, 387; but such allowance can in no case be applied to the payment of the judgment; while if he is sentenced to labor, and does labor, he is entitled to a credit of one dollar and fifty cents per day. *State v. Jordan*, 39 Iowa, 387. The Supreme Court will not reduce the penalty adjudged by the District Court until all the evidence of the case is before it. *State v. Harris*, 36 Iowa, 268. The district attorney has no authority to make an agreement as to the amount of fine or penalty. *State v. Reininghaus*, 43 Iowa, 149.

SENTENCE, FORM OF.

A sentence of imprisonment "until fine and costs are paid by labor at the rate of a dollar and a half a day," is held erroneous. A proper form or entry may be, "that the defendant pay a fine of ——dollars; and that he be required to labor during the time of his imprisonment; and that he be credited upon the

judgment for such labor at the rate of one dollar and fifty cents per day." *State v. Jordan*, 39 Iowa, on page 390.

ABATEMENT OF NUISANCE.

The fine, penalty and abatement of a nuisance for selling liquor, or a conviction under this chapter, are governed by Chap. 14, page 639, Code, 1873, title "Nuisances and Abatement Thereof."

PROCEEDINGS IN LIQUOR CASES BEFORE JUSTICES AND INFERIOR COURTS.

As we have before seen (title, Jurisdiction of Courts), in this chapter, the jurisdiction of justices of the peace is limited to the first two violations of Secs. 1540 and 1542 of the Code.

The form of the information for selling may be as follows:

STATE OF IOWA } Before A H, a justice of the peace of Marion township, Linn
vs. } county, Iowa.
..... } Information.

The defendant is accused of the crime of selling intoxicating liquors. For that the defendant on the . . . day of . . . 18 . . , in Marion, township of Marion, Linn county, Iowa, did wilfully and unlawfully sell to one S T, intoxicating liquor, to-wit: whiskey, contrary to, and in violation of, law. J. T.

STATE OF IOWA, }
COUNTY OF LINN. }

I, J T, being duly sworn upon oath, say that the matters and things set out in the foregoing information are true, as I verily believe. J. T.

Subscribed and sworn to before me this . . . day of . . . , 18 . .

A. H., J. P.

Each sale is a separate and distinct offense. And the prosecutor may set out as many as he sees proper, in separate counts. And the defendant, if convicted, must be fined on each separate and distinct count, or he may be acquitted of some and convicted of others. And, where the prosecutor aims to set out separate counts, add, as a form, to the above information, after the word "whisky":

2d count. For that the defendant, in the county, township and state aforesaid, on the . . . day of . . . , 18 . . , did unlawfully sell to one W X intoxicating liquor, to-wit: brandy.

3d count. Continue in like manner as above until all the counts are set forth, which the prosecutor desires to prosecute on. The formal part, in commencing and concluding the information, need not be given in each count. When the

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defendant is arrested and brought before the court, the same proceedings are had as in other criminal cases.

SEVERAL COUNTS IN ONE INFORMATION.

Several charges may be set out in separate and distinct counts. *Devine v. State*, 4 Iowa, 444; *State v. Leis*, 11 Iowa, 416. But separate judgments must be rendered on each count. *Ib.*; *State v. Mulling*, 11 Iowa, 240. The fact that another crime is charged in the information of which the justice had not jurisdiction is not, after judgment, sufficient to oust the justice of the jurisdiction of such crime. An allegation of keeping intoxicating liquors with an intent to sell will be treated as surplusage. *State v. Silhofee*, *Western Jurist*, June No., 1878, page 379.

The words "for himself, clerk or agent, directly or indirectly," simply describe the crime in various modes, and the information need not set out these exact words to make it good. But to aver that he did sell, etc., is sufficient. *Devine v. State*, 4 Iowa, 444.

SALE TO PERSONS UNKNOWN.

An information charging that defendant "did unlawfully sell beer to persons unknown" was held, in effect, to charge one sale to several persons jointly, and hence not bad for duplicity under an ordinance making each separate act of selling, an offense. *State v. King*, 37 Iowa, 462.

VARIANCE.

Where the charge is a sale to divers persons, and the evidence shows a sale to one person, *held* that the variance between the proof and allegation was not fatal. *State v. King*, 37 Iowa, 462.

NAME OF PARTY TO WHOM SOLD.

An information charging the defendant with the sale of intoxicating liquor without stating to whom the sale was made is insufficient. *State v. Allen*, 32 Iowa, 491.

TIME OF SALE.

The precise time, as alleged in the information, need not be proved. *State v. Mulling*, 11 Iowa, 240.

LOCATION OF PREMISES.

The location of the premises where the liquor is sold is immaterial if the county, township and state are set forth properly. For authorities see "Indictment," "Location of Premises, Description," under "Prohibiting sale of Beer and Wine."

FINE—PENALTY.

On a conviction for selling liquor the fine cannot be more than that prescribed by statute, either by the justice or District Court on appeal. *Walters v. State*, 5 Iowa, 507; *State v. Shaw*, 23 Iowa, 317.

LENGTH OF IMPRISONMENT—CONSTRUCTION OF STATUTES.

The language used in Sec. 1540 of the Code, "shall stand committed ten days unless the fine and costs be sooner paid," control as to the length of time of imprisonment in such case, rather than the general provisions in Sec. 4509, Code, '73, that fixes the imprisonment at one day for every three and one-third dollars of the fine. These sections of the Code are the same as sections 1562 and 4881, Rev. 1860, on which this decision is based. *State v. Shaw*, 23 Iowa, 316.

NUISANCE—ABATEMENT OF BY JUSTICE.

In *Hintermeister v. State*, where the defendant was charged with the sale of intoxicating liquor, the court used this language: "So much of the order or judgment on the petition and demurrer as directed the nuisance to be abated, and assessed a fine against the building, may have been incorrect. 1 Iowa, on page 105.

PROCEEDINGS TO SEIZE AND CONDEMN LIQUORS.

The seizure and condemnation of liquors as provided in section 1544 of the Code, is within the exclusive jurisdiction of justices of the peace and other inferior courts. The following form may be used for the information or affidavit for the seizure of liquors:

STATE OF IOWA, } ss.
LINN COUNTY, }

I, A. B. being duly sworn, upon oath do state that I am a resident of said Linn county, and State of Iowa; that I have reason to believe, and do believe, that certain intoxicating liquors, to-wit: whiskey, gin, rum, wine, brandy and alcohol are owned and kept by one F. G. in a certain building known as a drug store, and situated on Iowa Avenue, in the city of Cedar Rapids, in said county and state, which said in-

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toxicating liquors are intended by the said F G to be sold in violation of the provisions of chapter six, title eleven, of the Code of Iowa. A. B.

Subscribed and sworn to by the said A B before me this . . . day of . . . , 18 .
—, J. P.

If the object is to search a dwelling the affidavit should be more specific, as in the latter part of section 1544 provided.

Upon the filing of the foregoing affidavit the justice shall forthwith issue a warrant of search to any peace officer of the county, which warrant may be in the following form:

COUNTY OF LINN, }
STATE OF IOWA. }

To L. G., marshal of the city of Marion: Proof by affidavit having been this day made before me by A B that he has reason to believe, and does believe, that intoxicating liquors, to-wit: whisky, gin, rum, wine, alcohol and brandy, are owned and kept by one F G, in a certain place known as a drug store, and situated on the . . . of lot . . . , block . . . , in the city of Cedar Rapids, Linn county, Iowa, which said intoxicating liquors are intended by the said F G to be sold in violation of chapter six, of Title Eleven, of the Code of Iowa. You are therefore commanded in the daytime to make immediate search upon the premises above described, and all dependencies thereof, for the above mentioned liquors, and if you find the same, or any part thereof, to bring the same, with all casks, barrels, cases, boxes, and vessels of any description containing the same forthwith before me.

Dated at my office in Marion, this . . . day of . . . , 187 . —, J. P.

The notice required by section 1546 may be in the manner following:

STATE OF IOWA, } Before . . . , a justice of the peace for . . . township.
LINN COUNTY. } ss. . . county, Iowa.
Notice.

To F G, and to all others whom it may concern:

You are hereby notified that by virtue of a search warrant issued on the . . . day of . . . , 187 . , by me the undersigned, a justice of the peace of Marion township, Linn county, Iowa, directed to L G, marshal of the city of Marion, in service, which warrant was by the said officer duly returned with service made, from which it appears that the said officer seized and now has in his possession, by virtue of said warrant, one barrel of whisky containing forty-two gallons, more or less, found and seized on the premises of said F G, and that the same will come up for trial at my office in Marion, said county and State, on the . . . day of . . . , 187 . , at which time and place you can appear and show cause, if any you have, why said liquor, together with the vessels in which it is contained, should not be forfeited.

Marion, Iowa, June 16, 1877. —, J. P.

If, upon trial, said liquor is adjudged forfeited, the court shall issue, to the officer having said liquors in custody, or some other peace officer, a written order as by Sec. 1547 required, which may be in the following form:

STATE OF IOWA, }
vs. } Order to Officer for Destruction of Liquors.
CERTAIN INTOXICATING LIQUORS. }

To L. G., Marshal of the City of Marion:

Whereas, the liquor seized in the above entitled proceedings were, on a trial, before me had on the . . . day of . . . , 18 . , adjudged forfeited, and to be destroyed: You are therefore commanded forthwith to destroy the said liquors, together with the

PROCEEDINGS TO SEIZE AND CONDEMN LIQUORS. 319

vessels which contain the same, as seized by you on the premises of F G, and make due and immediate return of your proceedings to me. _____, J. P.
Marion, Iowa, June 17, 1877.

When the liquor has been destroyed the officer should make his return of such fact to the justice without delay, and his return may be in the following form:

STATE OF IOWA, }
COUNTY OF LINN. }

Received the within order this . . . day of . . . 1878, and on the same day I destroyed said liquors, together with the vessels containing the same, by breaking the vessels and pouring the liquors on the ground. _____, Marshal.

CREDIBLE RESIDENT.

Wherean information was filed "that the informant believes that the defendant is selling intoxicating liquors contrary to law," it was held that the justice determines whether the informant is a credible resident of the county or not. The statute does not require each fact to be stated either in the information or warrant. *State v. Thompson*, 44 Iowa, 399.

PROCEEDINGS CONSIDERED CRIMINAL.

The proceeding to seize and condemn liquors is adjudged to be a criminal one. *Part lot 294 in Ottumwa v. State*, 1 Iowa, 509; *State v. Certain Intoxicating Liquors and Harris*, 40 Iowa, 95.

DEFENDANT NOT A COMPETENT WITNESS.

Where the party of whom the liquor was seized, appears before a justice, and claims the liquors as his own and denies that they were kept for sale or with intent to sell, he is not a competent witness; it being a criminal proceeding. *State v. Certain Intoxicating Liquors and Harris*, 40 Iowa, 95. But under the law of 1878, as now in force, the defendant is a competent witness.

EVIDENCE—SUFFICIENCY OF.

To justify an order for the destruction of intoxicating liquors seized upon a warrant, it must be found, not only that they were kept with intent to be sold, but sold in violation of law. *State v. Harris*, 36 Iowa, 137.

VERDICT.

In a proceeding where liquors are seized, and the object is to condemn the same on trial, the verdict should not only find

that the liquors in question were intoxicating, and were owned or kept by defendant at the time they were seized for the purpose of being sold within the State, but should also find that the liquors were kept for the purpose of "illegal sale." *State v. Harris*, 36 Iowa, 136.

NEW TRIAL.

Where, upon trial in the District Court, in a proceeding appealed from a justice of the peace for the seizure and condemnation of liquor, the verdict was for the defendant, held that the state was not entitled to a new trial. *State v. Certain Intoxicating Liquors and Harris*, 40 Iowa, 95. But under the law of 1878, as now in force, the defendant is a competent witness.

ATTORNEY'S FEES—COUNTY LIABLE.

Under Sec. 1578, Rev. 1860, Code of 1873, Sec. 1551, a county is not liable to an attorney for his services in prosecuting for a violation of the prohibitory liquor law, where such services are rendered at the request of one not a peace officer. *Blair & Brunson v. Dubuque county*, 27 Iowa, 181.

REPLEVIN—LIQUOR SEIZED.

Intoxicating liquors seized under an information for their forfeiture, are not the subject of replevin, and to take them from an officer by such process would be an illegal act. *Funk & Hartman v. Israel*, 5 Iowa, 438 and 452; *State v. Harris and Folsom*, 38 Iowa, 252.

PUNISHMENT FOR INTOXICATION.

The punishment for intoxication is within the jurisdiction of justices and inferior courts, and the form of the information may be as follows:

STATE OF IOWA, } Before . . . a Justice of the Peace for . . . township, . . .
vs. } county, Iowa.

The defendant is accused of the crime of intoxication: For that the defendant on the . . . day of . . . , 187 , in the city of Marion, township of Marion, Linn county, Iowa, was found in a state of intoxication, contrary to, and in violation of, law. E. C. —.

Subscribed and sworn to before me by the said E. C., this . . . day of . . . , 1878
—, J. P.

Under the Rev. of 1860, Sec. 1568, the punishment for intoxication was by fine of ten dollars with costs, "and imprison-

ment in the county jail for thirty days," while under the Code of 1873, Sec. 1548, the punishment is by fine of ten dollars "or shall be imprisoned in the county jail for thirty days."

PENALTY—IMPRISONMENT AND FINE.

Under the Revision, as above cited, the language seems to be imperative that thirty days imprisonment shall form a part of the punishment for intoxication. *State v. Patton*, 19 Iowa, 458.

SIGNIFICANCE.

"Drunkenness" has the same legal signification as "intoxication." *State v. Patton*, 19 Iowa, 459.

BEER, AND SALE THEREOF—LAGER BEER—INTOXICATING LIQUORS.

It is not a violation of the prohibitory liquor law to sell lager beer. The limitation contained in the concluding words of section 1583, Rev. 1860, and section 1555, Code 1873, which is substantially the same as the section under the Rev. does not apply to beer. *State v. Brindle*, 28 Iowa, 512.

BEER CONSIDERED INTOXICATING.

Beer is included in the term spirituous or intoxicating liquor. *Nevin v. Ladue*, 3 Denio, 43 and 437; *Jewett v. Wanshura*, 43 Iowa, 574. But in Iowa beer is considered as "intoxicating liquor" under section 1557, only so far as giving a right of civil actions for recovering damages by reason of selling beer to habitual drunkards or minors, but not otherwise, as there is an exception made in section 1555, permitting beer to be sold.

PROPOSITIONS FOR SALE CANNOT BE SUBMITTED TO A VOTE OF THE PEOPLE.

The legislature has no power to make the operation or repeal of a law dependent upon a vote of the people. And "an act to provide for the prohibition of the sale of ale, wine and beer in counties by a vote of the people," is unconstitutional and void. *Santo v. State*, 2 Iowa, 203; *Geebrick v. State*, 5 Iowa, 492; *State v. Weir*, 33 Iowa, 134.

MUNICIPAL CORPORATIONS MAY REGULATE SALE OF.

Municipal corporations have the power and authority to regulate or prohibit the sale of beer and wine. *State v. Binder*, 38 Mo., 450; *State v. King*, 37 Iowa, 462.

MINORS PROHIBITED IN SALOONS—LAWS FIFTEENTH GENERAL ASSEMBLY (1874), CHAPTER 59.

SECTION 1. It shall be unlawful for any person who keeps a billiard hall, beer saloon, or nine or ten pin alley, or the agent, clerk, or servant of any such person, or any person having charge or control of any such hall, saloon or alley, to permit any minor or minors to remain in such hall, saloon, or alley, or to take part in any of the games known as billiards, nine or ten pins.

SEC. 2. For a violation of the provisions of the foregoing section the offender shall, on conviction thereof, be punished by a fine not less than five dollars nor exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days.

The violation of the foregoing provisions is within the jurisdiction of a justice, and the information may be in the following form:

STATE OF IOWA, } Before . . . a Justice of the Peace for . . . township, . . .
vs. } county, Iowa.
Information.

The defendant is accused of the crime of permitting a minor to remain in a billiard hall: For that the defendant on the . . . day of . . . , 187 , at the town of . . . county, Iowa, being then and there the keeper of a billiard hall in said town, did unlawfully and willfully permit one A S to remain in his billiard hall and did then and there permit the said A S to play billiards, the said A S being a minor, contrary, etc. L. M. ———

STATE OF IOWA, }
LINN COUNTY. }

I, L M, being duly sworn upon oath do say that the matters and things in above information set forth, are true as I verily believe. L. M. ———

Subscribed and sworn to before me by the said L M, this . . . day of . . . , 187 ,
J. P. ———

KNOWLEDGE OF DEFENDANTS AS TO AGE OF PERSONS PLAYING

As to whether defendant would be guilty of an offense he believed the minor to have attained his majority, *quæ* At least such ignorance as to age, is a matter of defense for him to establish on trial. *State v. Dericks*, 42 Iowa, 196. The object was, in the above cited case, to determine the identical question, as to whether it would be any defense, so

far as the ignorance of the defendant of the minor's age is concerned, and hence was inserted the third clause in the agreed statement of facts, by the author: *Third*. "The minor, B. Mentzer, referred to, was between the age of twenty and twenty-one years, and to all appearance was of age and over." But this question is virtually decided as against the defendant, on the point raised in the above case, in *Jamison v. Burton*, which was a civil action for damages by reason of selling liquor to a minor in violation of section 1539 of the Code. Under this statute there is a general inhibition upon the sale of intoxicating liquors to minors, except by written permission. While this law, prohibiting minors remaining in billiard halls is a general inhibition without any exception, yet in the civil case last referred to, the court say: "It would seem to follow, logically, that a sale to a minor is a violation of the statute, and that the person selling must, at his peril, know that the person to whom he sells, is authorized to buy, and assumes the burden of knowing that these circumstances exist. Want of knowledge is no excuse." From this language we may infer, that where a party permits a person to remain in his billiard hall or saloon he does it at his peril. And the fact that the minor represents himself to be of age can form no defense on trial if the facts are otherwise. This civil case referred to will be found in 43 Iowa, 282, in which *State v. Hatfield*, 24 Wis., 60, and *McCutcheon v. People*, Chic. Leg. News, 1874, page 167, and authorities, are cited.

RAPE.

SECTION 3861. If any person ravish and carnally know any female of the age of ten years or more, by force and against her will, or carnally know and abuse any female child under the age of ten years, he shall be punished by imprisonment in the penitentiary for life or any term of years.

SEC. 4560. The defendant in a prosecution for a rape, cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense.

SEC. 4558. Proof of actual penetration into the body is sufficient to sustain an indictment for rape. [Limitation, by section 4166, eighteen months.]

Form of Indictment.

THE STATE OF IOWA, } In District Court of . . . county, . . . term, 1878.
 vs. } Rape.
 } Indictment.

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of rape, committed as follows: That the said . . . , on the . . . day of . . . , 187 . . . in the county of . . . and State of Iowa, did with force and arms at the county aforesaid, in and upon one . . . , unlawfully, willfully and feloniously make an assault, and did then and there ravish and carnally know forcibly against the will of said . . . the said . . . , then and there being a female over the age of ten years, contrary, etc.

Or, in and upon one . . . , a female child under the age of ten years, to-wit: nine years of age, unlawfully, willfully and feloniously did make an assault, and did then and there feloniously and with force and arms and against the will of said . . . , carnally know and abuse, contrary, etc.

INDICTMENT—NAME OF INJURED PARTY.

The exact name of the injured party need not necessarily be proved as alleged in the indictment. *State v. Emeigh*, 18 Iowa, 123. But if committed on a child under ten years of age, the indictment should allege that the age of the child was under ten years. *State v. Newton*, 44 Iowa, 45.

ONE OR MORE MAY BE JOINED.

Two or more persons may be joined in an indictment for rape. *State v. Dennison*, 5 Ark., 230.

FORCIBLY—ALLEGATION OF.

The words "forcibly" and "against the will," are essential in an indictment for rape. *State v. Jim*, 1 Dev., 142. It is otherwise as to the words "unlawfully." *Com. v. Bennett*, 2 Va. Cases, 235; *Weinzorflin v. State*, 7 Blackf., 186.

FELONIOUSLY.

The failure to charge that the assault was "feloniously" made is insufficient. *State v. Scott*, 72 N.C., 461; while in Massachusetts the omission of the words "feloniously" and without "force" and "arms" is no longer a ground for a motion in arrest of judgment. *Com. v. Scannel*, 11 Cush., 547.

RAVISH.

The word "ravish" is essential in an indictment for rape. *Gongleman v. People*, 3 Park. Cr. R., 15.

CARNAL KNOWLEDGE.

The words "carnal knowledge" of a woman by a man means sexual bodily connection. *Com. v. Squires*, 97 Mass., 59.

UPON CHILD—FORCE.

The indictment charging a rape upon a child under the age of ten years, need not allege that the act was committed with "force" and against the will of said child; the averment that she was of tender years being equivalent. *State v. Black*, 63 Maine, 210.

NAME OF INJURED PERSON.

Where it was alleged "as Ellen Frances Davis," and it was proved that her true name was "Helen Frances Davis," it was held that the variance was immaterial. *Taylor v. Com.*, 20 Gratt., 825.

AVERMENT OF SEX.

In an indictment for rape, the pronoun "her" sufficiently indicates the sex without expressly averring that the person injured was a female, and need not state that the female was more than ten years of age. *Hill v. State*, 3 Heisk. Tenn., 317; *Taylor v. Com.*, 20 Gratt. Va., 825; *State v. Farmer*, 4 Iredel, 224.

AGE—ALLEGATION OF.

The indictment for rape need not allege that the defendant is fourteen years of age, nor that the person upon whom the rape was committed was not the wife of the defendant. *Com. v. Scannel*, 11 Cush., 547.

A rape may be committed upon a female of *any* age, and it need not be averred that the injured party is over the age of ten years; but if upon a child under ten years, it must be alleged and proved that it was a child under ten years of age. *Mobly v. State*, 46 Miss., 501; *State v. Farmer*, 4 Ired., 224; *Bowles v. State*, 7 Ohio, 243; *People v. Yek*, 29 Cal., 576; *State v. Storkey*, 63 N. C., 7.

DUPLICITY.

An indictment which charges a rape and an assault with intent to commit a rape, does not charge two offenses. *People v. Tylor*, 35 Cal., 553.

BAR.

A conviction of an assault with intent to commit a rape is a bar to a charge of rape. *State v. Shepard*, 7 Conn., 54.

ELEMENTS—ACCUSATION.

Rape is an accusation easy to be made, hard to be proved, and harder to be defended by the party accused, although innocent. 1 Hale, 635; Roscoe's Cr. Ev., 880; *People v. Hulse*, 3 Hill, N. Y., 309; *State v. Tomlinson*, 11 Iowa, 402; 69 Ill., 55; 1 Am. Cr. R., 650.

AGE—PUBERTY.

It is at the age of puberty and not at the age of majority, that a female ceases to be a child and becomes a woman within the meaning of statutes defining the crime of rape. *Blackburn v. State*, 22 Ohio St., 102; 1 Green's Cr. R., 660.

EMISSION.

In Ohio, emission is a necessary element in the crime of rape, though decided with some doubt. *Williams v. State*, 14 Ohio, 222; *Blackburn v. State*, 22 Ohio St., 102; 1 Green's Cr. R., 660. Contrary in Pennsylvania. *Penn. v. Sullivan*, Addis., 143; nor is it essential in Iowa.

MEANING OF RAPE.

Rape is the carnal knowledge of a female, forcibly and against her will. *Charles v. State*, 6 Eng., 389.

FORCE IS ESSENTIAL.

Rape can only be accomplished by force and with the utmost reluctance and resistance on the part of the woman. *People v. Cornwell*, 5 Am. Law Reg., 339; *People v. Morrison*, 1 Park. Cr. R., 625; *Woodin v. People*, Ib., 464; *People v. Dohring*, 59 N. Y., 374; 17 Am. R., 349; *Crosswell v. People*, 13 Mich., 427; *Strong v. People*, 24 Mich., 1; *Moran v. People*, 25 Mich., 356; *State v. Burgdorf*, 53 Mo., 65; 2 Green's Cr. R., 593.

INABILITY TO RESIST.

A child or woman of weak or unsound mind, or insensible at the time, are considered unable to resist. *People v. Cornwell*, 5 Am. Law Reg., 339; *People v. McDonald*, 9 Mich., 150. The failure of the female to make any outcry when a violation of her person is attempted, and the fact that her garments are uninjured in the struggle with her assailant, tend strongly to show consent, but are not conclusive, and

should always be considered in connection with her age and intelligence. *State v. Cross*, 12 Iowa, 66. But it is not necessary to establish the non-consent or force by proof of the outcries of the female, nor by any one else. *State v. Tarr*, 28 Iowa, 397. So, where a man has carnal intercourse with a woman (not his wife) without her consent, while she is, as he knows, wholly insensible, he is guilty of rape. *Com. v. Burke*, 5 Mass., 376; 7 Am. R., 531; *Moore v. State*, 17 Ohio St., 1; *Smith v. State*, 12 Ohio St., 470.

SENT—FRAUD.

If consent is obtained through fraud, the act is the same as if consent had been extorted by threats, or resistance overcome by force. *People v. Cornwell*, 5 Am. Law Reg., 339; *People v. Barton*, 1 Wheeler's Cr. Cases, 378; *Walter v. People*, 50 Barb., 144; 7 Conn., 57.

FRAUD—EVIDENCE.

A conviction cannot be sustained on mere evidence of fraud unless it further appears that if the defendant failed in his fraudulent acts, he would have used force. *Walter v. People*, 6 Am. Law Reg., 746; *Moran v. People*, 25 Mich., 356; 12 Am. R., 283; *Walter v. People*, 50 Barb., 144.

CONSENT—FRAUDULENT REPRESENTATION.

In case of consent the defendant cannot be convicted, although such consent was obtained by fraudulent representations. *Moran v. People*, 25 Mich., 356; 12 Am. R., 283; *Lewis v. State*, 30 Ala., 54.

FORCE—CONSTRUCTION OF.

Where the female consented, yet if her consent was obtained by the use of force, and her will was overcome by fear of personal injury, it is rape and not seduction. *Cochran v. State*, 22 Wis., 444; *Moran v. People*, 25 Mich., 356; 12 Am. R., 283; *Wright v. State*, 4 Humph., 194.

CARNAL KNOWLEDGE.

The carnal knowledge of a female under ten years of age is a rape, although the act be committed with her consent. *Fizle v. State*, 25 Wis., 364; *Williams v. State*, 47 Miss., 609.

PENETRATION.

Under the existing laws of North Carolina, the slightest penetration is sufficient to constitute rape. *State v. Hargrave*, 65 N. C., 466.

EVIDENCE—INFANTS—PRESUMPTION.

While the law presumes infants under certain ages incapable of committing rape, this presumption may be rebutted by proof that such person has arrived at the age of puberty. *Williams v. State*, 14 Ohio, 22; *O'Meara v. State*, 17 Ohio State, 515.

CORROBORATION.

The defendant cannot be convicted of having carnal intercourse with a female by her testimony alone, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense. *State v. Danforth*, Western Jurist, June No., 1878, page 373.

PROOF OF FORCE.

To convict of rape it need not be proved that the force employed was such as to create a reasonable apprehension of death on the part of the woman. *Waller v. State*, 40 Ala., 325; and sufficient if she used all the force in opposition of which she was capable. *Com. v. McDonald*, 110 Mass., 405; 2 Green's Cr. R., 267. So, evidence of feeble health of the female is proper. *State v. Knapp*, 45 N. H., 148.

PROOF OF PENETRATION.

On a charge of a rape on a child under ten years of age, penetration may be proved from circumstances. *Brauer v. State*, 25 Wis., 413.

COMPLAINTS BY INJURED PARTY.

Evidence of complaints made by the injured female to another person, may be on the part of the State, when made soon after the occurrence; but the particulars of such complaints are not admissible, unless drawn out on cross examination, or by way of confirming her evidence after it has been impeached, or for the purpose of impeachment, after a foundation is laid. But such evidence is only admissible where the injured party is introduced as a witness, as held by most of

the authorities. 3 Greenleaf, Sec. 213; 2 Bishop, Cr. Prac., Secs. 911, 912; *State v. Richards*, 33 Iowa, 420; *Burt v. State*, 23 Ohio St., 394; 2 Green's Cr. R., 543; 1 East. P. C., 443; 2 Starkie R., 241; *State v. Emeigh*, 18 Iowa, 224; *Johnson v. State*, 17 Ohio, 593; Roscoe's Cr. Ev., page 25, 7th ed.; 36 N. J., 233; *Laughlin v. State*, 18 Ohio, 99; *Baccio v. People*, 41 N. Y., 265; *McCombs v. State*, 8 Ohio St., 643; *State v. McGee*, 1 Denio, 19; *Smith v. State*, 47 Ala., 540; *Stephen v. State*, 11 Ga., 225; *State v. Niles*, 47 Vt., 82; *Lacy v. State*, 45 Ala., 80; *State v. Shettleworth*, 18 Minn., 208; 1 Am. Cr. R., 646.

TIME OF COMPLAINTS.

Whether evidence of complaints, made three weeks after the alleged offense, can be introduced, *quere?* *Baccio v. People*, 41 N. Y., 265; *Turner v. People*, 33 Mich., 383. It is held that mere lapse of time cannot be made the test of the admissibility of evidence, but is a matter for the jury with all the facts. *State v. Peter*, 8 Jones, 19; *State v. Niles*, 47 Vt., 82; *Higgins v. People*, 58 N. Y., 377; 1 Am. Cr. R., 646.

DECLARATION OF HUSBAND OF INJURED FEMALE.

The acts and declarations of the husband of the woman on whom the offense is alleged to have been committed, are not admissible to discredit the wife as a witness. *State v. Jefferson*, 6 Ired., 305; *McCombs v. State*, 8 Ohio St., 643.

PRESUMPTIONS.

The facts that the female immediately made complaint, her appearance, and whether she bore upon her person marks of violence are important, and any evidence showing that she feared danger to life or limb, if she resisted, is admissible. *Strang v. People*, 24 Mich., 1.

RESEMBLANCE OF CHILD.

The child, about three months old, should not be shown to the jury as bearing a resemblance to the defendant. It is too uncertain to be allowed as evidence in a case of this character. It would be an unwise and dangerous rule to hold that a man may be convicted by reason of a supposed resemblance between a child of that age and himself. *State v. Danforth*, Western Jurist, June No., 1878, page 373.

The fact that an alleged rape was not communicated to any one for a long time, affords a strong presumption that the charge is false. *Higgins v. People*, 8 N. Y. (N. S.), 307; 58 N. Y., 377.

CHASTITY.

The character for chastity of the female cannot be impeached by evidence of particular acts of unchastity, but only as to her general character for chastity is evidence admissible. Nor can she be interrogated as to previous intercourse with persons other than the defendant. *McCombs v. State*, 8 Ohio St., 643; *McDermott v. State*, 13 Ohio St., 332; *People v. Jackson*, 3 Park. Cr. R., 391; 69 Ills., 55; 1 Am. Cr. R., 650. The defendant may show that the female was in the habit of receiving men at her house for the purpose of promiscuous intercourse with them. *Woods v. People*, 55 N. Y., 515; 1 Green's Cr. R., 659; *Campbell v. State*, 3 Kelly, 417; Roscoe's Cr. Ev., 880; 15 Ark. R., 624; 6 Ired., 308; 1 Texas Court of Appeals R., 33. And it is held also that the female may be interrogated as to intercourse with other men, and she may be shown to be a prostitute. *State v. Johnson*, 28 Vermont; *People v. Benson*, 6 Cal., 221; *State v. Sutherland*, 30 Iowa, 573; *People v. Abbott*, 19 Wendell, 192. This last case is, however, overruled in *People v. Jackson*, 3 Park. Cr. R., 391, the authorities holding that it is proper to receive evidence of the general reputation and the character of the prosecutrix; holding such to be proper, not for the purpose of justifying or excusing the offense, but to raise a presumption that she yielded her consent, and was not, in fact, forced. *Dorsey v. State*, 1 Texas Court of Appeals R., 33; *Rogers v. State*, Ib., 187; *Jenkins v. State*, 1 Ib., 346.

IMPEACHMENT.

As to reputation for chastity, the time is limited to the date of the commission of the offense; and, as to truth and veracity, it is limited to the time of examination. 19 Ohio St., 278.

CONSENT PRESUMED—DEFENSE.

The failure of the female to make any outcry or complaints afterward, and other like circumstances, tend strongly to

show a consent, but are not conclusive. *State v. Cross*, 12 Iowa, 67.

ADULT SUBMISSION.

A submission of an adult, in most cases, proves consent. *State v. Cross*, 12 Iowa, 67.

SUBMISSION BY CHILD.

The submission of a child can by no means be taken to be a consent. *State v. Cross*, 12 Iowa, 67; *State v. Newton*, 44 Iowa, 45.

WEIGHT OF EVIDENCE.

It is incumbent on the State to show that the acts were done by force and without the consent of the female. *Pol-lard v. State*, 2 Iowa, 567.

DEFENSE—INSUFFICIENCY OF EVIDENCE.

Where the defendant had intercourse with the prosecutrix previous to the alleged commission of the offense, and upon other like circumstances, a conviction will not be sustained. *People v. Benson*, 6 Cal., 221; *People v. Hamilton*, 46 Cal., 540; 2 Green's Cr. R., 432.

DEFENDANT'S KNOWLEDGE.

A defendant's knowledge of the inability of the prosecutrix to resist may be inferred. *State v. Farr*, 28 Iowa, 397.

VARIANCE—PROOF—INDICTMENT.

The prosecution cannot charge a rape of the one class, such as a rape on a woman, and sustain the charge by proof of a rape on a child; the variance between the allegation and the proof is fatal. *Greer v. State*, 50 Ind., 267; 19 Am. R., 709; *Turly v. State*, 3 Humph., 323; *Hooker v. State*, 4 Ohio, 348; *State v. Noble*, 15 Maine, 476; *State v. Jackson*, 30 Maine, 29; *Dick v. State*, 30 Miss., 631.

CROSS-EXAMINATION OF WITNESSES.

On a trial for a rape where the case turns almost wholly upon the testimony of the prosecutrix, a wide latitude should be allowed on cross-examination as to facts having a legitimate bearing on the question whether the act imputed to the

defendant was against her will. *Rogers v. People*, 24 Mich., 345.

ADMISSIONS OF THE DEFENDANT—INSTRUCTIONS.

Where the defendant made statements as to his intentions to go where the prosecutrix was, without stating his intent to commit the crime, it is error to instruct that such may show a thought of criminal intercourse. *State v. Warner*, 25 Iowa, 200.

INSTRUCTIONS.

An instruction that the jury might consider the complaints and particulars thereof is erroneous, though the evidence was admitted without objection. Giving the force of incompetent evidence to that which is competent, is erroneous, and to the prejudice of the defendant. *State v. Richards*, 33 Iowa, 420.

INSTRUCTION—RAPE—SEDUCTION.

It is proper to instruct if the act was done by force, it is rape and not seduction, and the defendant cannot be convicted of seduction. *State v. Kingsley*, 39 Iowa, 439.

KNOWLEDGE OF FEMALE'S AGE.

The crime of rape does not depend upon the knowledge by the defendant of the fact that the child was under ten years of age, but upon the fact itself. *State v. Newton*, 44 Iowa, 45.

VERDICT—CONVICTION—DEGREES.

The jury, on an indictment for rape, may convict the defendant of an assault with intent to commit rape, if the assault is properly charged. *State v. Cross*, 12 Iowa, 67; *Commonwealth v. Dean*, 109 Mass., 349; 1 Green's Cr. R., 195. An assault is necessarily charged substantially in an indictment for rape. *Com. v. Drum*, 19 Pick., 479; *Com. v. Bakeman*, 105 Mass., 53; *Morey v. Com.*, 108 Mass., 433; *Hanna v. People*, 19 Mich., 316; *Campbell v. People*, 34 Mich., 351; 15 Mass., 187; 1 Dennison, 36; 9 Mich., 150.

So, the prisoner may be convicted of an *assault* with intent to commit a rape, upon proof that a rape was actually committed. *State v. Smith*, 43 Vt., 324.

RAILROADS, EXPRESS AND TELEGRAPH COMPANIES.

LAWS OF 1876, CHAPTER 63.

SECTION 1. That all railroads terminating in Iowa shall establish and maintain at such terminus, general freight and passenger offices (and express and telegraph offices, when operating an independent express or telegraph company), at localities accessible and convenient to the public, and there keep for sale tickets over their respective roads, and in advertising, correctly set forth their true connections, starting or terminal points, time tables and freight tariffs, affording correct information to the business and traveling public.

SEC. 2. If any officer, agent, employe, or lessee engaged in operating any railroad, express company or telegraph line, terminating in or operated within the State of Iowa, shall refuse or neglect to comply with any of the provisions or requirements of section one (1) of this act, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not exceeding five hundred dollars, and may be imprisoned not more than six months.

REFUSAL BY ATTORNEY TO PAY OVER CLIENTS MONEY.

SECTION 224. An attorney who receives the money or property of his client in the course of his professional business, and refuses to pay or deliver it in a reasonable time after demand, is guilty of a misdemeanor.

SEC. 225. When the attorney claims to be entitled to a lien upon the money or property, he is not liable to the penalties of the preceding section, until the person demanding the money proffers sufficient security for the payment of the amount of the attorney's claim when it is legally ascertained.

SEC. 226. Nor is he in any case liable as aforesaid, provided he gives sufficient security that he will pay over the whole, or any portion thereof, to the claimant when he is found entitled thereto. [Limitation, by sections 3967 and 4167, three years.]

Form of Indictment.

THE STATE OF IOWA, } In the District Court of . . . county, . . . term, 1878.
vs. }

. . . } *Indictment.*

The grand jury of the county of . . . in the name and by authority of the State of Iowa, accuse . . . of the crime of refusing to pay money over to another, as his client, committed as follows: That A B, on . . . at . . . then and there being an attorney at law, and then and there being legally authorized, among his other

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duties as said attorney, to collect and receive moneys, did collect and receive one hundred dollars, current money of the United States, on account of and for one C D; that the said A B, not regarding his duty as such attorney, but afterward on the . . . day of . . . in said county and State, demand for the payment of said money having been duly made by the said C D, the said A B being required by law to pay over said money, less his legal fees to the said C D, fraudulently and unlawfully failed and refused to pay said money to the said C D, contrary to, and in violation of, law.

RESISTING AND REFUSING TO ASSIST OFFICERS.

SECTION 3960. If any person knowingly and willfully resist or oppose any officer of this State, or any person authorized by law, in serving or attempting to execute any legal writ, rule, order or process whatsoever, or shall knowingly and willfully resist any such officer in the discharge of his duties without such writ, rule order or process, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars nor less than fifty dollars, or by both fine and imprisonment at the discretion of the court.

SEC. 3961. If any person, being lawfully required by any sheriff, deputy sheriff, coroner, constable, or other officer, willfully neglect or refuse to assist him in the execution of his office in any criminal case, or in any case of escape or rescue, he shall be punished by imprisonment in the county jail not more than six months, or by fine not more than one hundred dollars. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA, } In District Court of . . . county, . . . term, 1878.
vs. }

Indictment.

The grand jury of the county of . . . in the name and by the authority of the State of Iowa, accuse . . . of the crime of knowingly and willfully resisting an officer, committed as follows: That A B, on the . . . day of . . . 187 , at Marion, in and upon one M N, then and there being, knowingly, willfully, unlawfully and violently did make an assault; the said M N being then and there a ministerial officer, to-wit: the constable of Marion township, in the county aforesaid, and then and there being in the due and legal execution of his said office of constable, by then and there endeavoring in a lawful manner to suppress and prevent a breach of the peace, which said breach of the peace was then and there being committed by the said A B and one C D, and the said A B, the said M N then and there in the due execution and discharge of his official duty as aforesaid, did unlawfully, knowingly and willfully strike, beat, wound, abuse and ill treat contrary to, and in violation of, law.

Or, the following form (after formal part) :

. . . did knowingly and willfully obstruct, resist and oppose M N, who was then and there a constable of said county, in attempting to serve an execution upon the goods and chattles of A B, which execution was issued by C D, a justice of the peace of the said county, and delivered to the said M N, constable as aforesaid, to be by him executed upon a judgment rendered by the said justice of the peace against the said A B, in favor of E F, against the peace and dignity of the State, and contrary to, and in violation of, law.

Or, under section 3961 (after formal part, as above) :

The said A S, then and there being the constable of Marion township, in said

county and State, and having in his possession a certain warrant issued by one H J, a justice of the peace, commanding him to arrest one L M on a charge of seduction; and being then and there on the day and year aforesaid about to serve said warrant by virtue of his office did then and there, as such constable and in the name of the State of Iowa, apply to and command the said A B to aid and assist him in making said arrest and serving said warrant, and being so lawfully required by the constable to assist the said A B, did willfully, unlawfully and knowingly refuse and neglect to so assist the said A S in the execution of his office as such constable, contrary to, and in violation of, law.

INDICTMENT.

It is not necessary to charge in the indictment that the officer, at the time, informed the defendant who resisted that he acted under the authority of a warrant. This would apply to the party about to be arrested, but not to the one resisting. *State v. Freeman*, 8 Iowa, 432. The contrary is held in *State v. Deniston*, 6 Blackf., 277.

GENERALLY.

The indictment need not set forth, at length, the acts of the officer, or show that in making the arrest he complied, in all respects, with the statute; he will be presumed to have discharged his duties. *State v. Freeman*, 8 Iowa, 432.

ALLEGATION OF TIME.

Nor is it essential to charge that the defendant resisted the officer at the time of the alleged attempt by him to execute the warrant, as the time is immaterial. *State v. Freeman*, 8 Iowa, 433.

VARIANCE—OFFICER'S NAME.

In an indictment for resisting an officer, an erroneous allegation respecting the name of the officer resisted, such as Ryan instead of Ryder, does not constitute a fatal variance. *State v. Flynn*, 42 Iowa, 164.

MUST ALLEGE THE NECESSARY FACTS.

An indictment which alleged "that the defendant on with force and arms, one D. then and there being sheriff of said county, and also then and there being in the execution of his said office, as such sheriff as aforesaid, unlawfully and willfully did resist, contrary," etc., is insufficient. It should set forth the facts constituting the crime, so that the accused may have notice of what he is to meet. *Lamberton v. State*, 11 Ohio, 282.

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RESISTING EXECUTION OF A SEARCH WARRANT.

An indictment for obstructing the execution of a search warrant must show that the warrant appeared on its face to be founded on a sufficient affidavit. *State v. Tuell*, 6 Blackf., 344.

ELEMENTS—ARREST WITHOUT WARRANT.

Under the Revision of 1860, section 4296, it was not a punishable offense to resist an officer "*without*" a warrant, as the language of the section is "in serving or attempting to execute any legal writ, rule, order, or process whatever." *State v. Lovell*, 23 Iowa, 304. This section of the Revision was amended by section 1, laws of 1868, chapter 150, page 208, as incorporated in the Code of 1873, section 3960, so as to read, "or shall knowingly and willfully resist any such officer in the discharge of his duties, *without* such writ, rule, or process."

ROAD SUPERVISOR AS AN OFFICER.

A road supervisor is not such an officer as is referred to in the statute against resisting officers in the service of a process or in the discharge of their duties, under the law. *State v. Putnam*, 35 Iowa, 561.

IS AN INDICTABLE OFFENSE.

Refusing, without sufficient excuse, to assist a constable, is an indictable offense. *State v. Deniston*, 6 Blackf., 277.

DEFENSE.

The fact that a writ was issued by a justice, upon an insufficient affidavit, does not constitute a valid defense to a charge of resisting an officer. *State v. Foster*, 10 Iowa, 435.

A party has no right to resist a process though the officer is about to levy on property illegally. This the defendant is not to determine by resisting, but, if unlawfully taken or levied upon, he has, and must resort to, his remedy at law. *State v. Downer*, 8 Vt., 424; *State v. Miller*, 12 Vt., 437; *Farris v. State*, 3 Ohio St., 158; while a contrary decision was made in *Commonwealth v. Kennard*, 8 Pick., 135.

RESISTANCE TO PROCESS AND SUPPRESSION OF RIOTS.

SECTION 4145. When the sheriff or other officer authorized to execute process, finds, or has reason to apprehend, that resistance will be made to the execution thereof, he may command as many male inhabitants of his county as he may think proper, and any military companies in the county, armed and equipped, to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the resisters, and their aiders and abettors, to be punished by law.

SEC. 4146. The officer shall certify to the court from which the process issued, the names of the resisters and their aiders and abettors, to the end that they may be punished for a contempt.

SEC. 4147. Every person commanded by a public officer to assist him in the execution of process, as provided in section four thousand one hundred and forty-five of this chapter, who, without lawful cause, refuses or neglects to obey such command, is guilty of a misdemeanor.

SEC. 4148. If it appear to the governor that the power of any county is not sufficient to enable the sheriff to execute process delivered to him, he may, on the application of the sheriff, order such posse or military force from any other county or counties as is necessary.

SEC. 4149. When persons to the number of twelve or more, armed with dangerous weapons, or persons to the number of thirty or more, whether armed or not, are unlawfully or riotously assembled in any city or town, the judges, sheriff and his deputies if they be present, the mayor, aldermen, marshal, constables, and justices of the peace of such city or town, must go among the persons assembled, or as near them as may be safe, and command them, in the name of the State, immediately to disperse.

SEC. 4150. If the persons assembled do not immediately disperse, the magistrates and officers must arrest them, that they may be punished according to law, and for that purpose may command the aid of all persons present or within the county.

SEC. 4151. If any person commanded to aid the magistrate or officer, without good cause neglect to do so, he is guilty of a misdemeanor.

SEC. 4152. If a magistrate or officer having notice of an unlawful or riotous assembly as above provided in this chapter, neglect to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority

with which he is invested for suppressing the same and arresting the persons, he is guilty of a misdemeanor.

SEC. 4153. If the persons so assembled and commanded to disperse, do not immediately disperse, any two of the magistrates or officers before mentioned, may command the aid of a sufficient number of persons, and may proceed in such manner as, in their judgment, is necessary to disperse the assembly and arrest the offenders.

SEC. 4154. When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, it must obey such orders in relation thereto as have been made by the governor, or by a judge of the supreme, district, or circuit court, a sheriff, or magistrate, as the case may be.

RESISTANCE TO THE COMMISSION OF A PUBLIC OFFENSE.

SECTION 4112. Lawful resistance to the commission of a public offense may be made by the party about to be injured, or by others.

SEC. 4113. Resistance sufficient to prevent the offense may be made by the party about to be injured:

1. To prevent an offense against his person;
2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

SEC. 4114. Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.

ACTS CONSTITUTING A DEFENSE.

As to what acts or resistance can be made in defense of person or property, see title "Self Defense."

ROBBERY.

SECTION 3858. If any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery, and shall be punished according to the aggravation of the offense as is provided in the following two sections.

SEC. 3859. If such offender at the time of such robbery is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or if being so armed he wound or strike the person robbed; or if he has any confederate aiding or abetting him in such robbery present and so

armed, he shall be punished by imprisonment in the penitentiary for a term not exceeding twenty years nor less than ten years.

SEC. 3860. If such offender commit the robbery otherwise than is mentioned in the preceding section, he shall be punished by imprisonment in the penitentiary not exceeding ten years nor less than two years. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA, } In the District Court of . . . county, . . . term, 1878.
VS. }

Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of robbery committed as follows: That said . . . , on the . . . day of . . . , 1878, in the county of . . . , and State of Iowa, did, in and upon one C D, feloniously make an assault, and the said C D, in bodily fear and danger of his life, then and there feloniously did put, and one gold watch of the value of one hundred dollars of the property of the said C D, from his person and against the will of the said C D, then and there feloniously and unlawfully did rob, steal, take and carry away contrary to, and in violation of, law.

This form is approved in *State v. Carr & Brown*, 43 Iowa, 418; *People v. Loop*, 3 Park. Cr. R., 559; *Quinlan v. People*, 6 Park. Cr. R., 6; *People v. Hall*, 6 Park. Cr. R., 642.

INDICTMENT—NAME OF PARTY ROBBED.

A mistake in the name of the person injured, in an indictment for robbery, is not material, unless it be shown that the party accused has suffered prejudice by reason of the mistake. *State v. Carr and Brown*, 43 Iowa, 418.

MONEY—GREENBACKS—ALLEGATION.

Money may be the subject of larceny, and an allegation that money was feloniously taken, is sustained by proof that the crime was the taking of greenbacks. The term "greenback" is well known and understood to mean money. *State v. Carr and Brown*, 43 Iowa, 418; *Turner v. State*, 1 Ohio St., 422.

PUTTING IN FEAR—FORCE—VIOLENCE.

An indictment for robbery is good although it does not contain the allegation "putting in fear." Allegations by force or violence are sufficient. *Commonwealth v. Humphries*, 7 Mass., 242.

VALUE AND DESCRIPTION OF PROPERTY STOLEN.

In robbery, the gist of the offense being force and terror, the value and description of the property are not material

matters. *People v. Loop*, 3 Park. Cr. R., 559; *Quinlan v. People*, 6 Park. Cr. R., 6; *Haskins v. People*, 16 N. Y., 347.

OWNERSHIP OF PROPERTY.

In robbery, the property may be laid as belonging either to the actual owner or to the person robbed. *Brooks v. People*, 49 N. Y., 436; 10 Am. R., 398.

ASSAULTING SEVERAL AND TAKING FROM ONE.

An indictment for robbery, charging the prisoner with assaulting G. P. and H. P., and stealing from one two dollars and from the other one dollar, is good. *Rex v. Gibbon et al.*, 1 Car. and M., 634; *Woodford v. People*, 20 Am. R., on page 467.

ALLEGATION OF INTENT.

Under the Ohio statute, an indictment which does not charge a felonious intent, is defective. *Boose v. State*, 10 Ohio St., 575.

ELEMENT—FELONIOUS INTENT.

To constitute robbery, there must be a felonious intent. If a man under a *bona fide* belief that the property is his own, obtain it by menaces, that is trespass, but not robbery. *State v. Hollyway*, 41 Iowa, 200; *Rex v. Hall*, 3 Car. and Payne, 409.

TAKING PROPERTY UNDER A BONA FIDE CLAIM.

Though the defendant take the goods with violence or by putting in fear, yet if he do so under a *bona fide* claim, it is not robbery, for the reason that the felonious intent is wanting. *State v. Hollyway*, 41 Iowa, 200; Roscoe's Cr. Ev., 7 Am. ed., 910; *Rex v. Donnelly*, 1 Leach, 196.

UNDER FALSE PRETENSES.

If one be induced by false pretenses to pay a debt which he justly owes, and which is already due, no indictment will lie therefor. *State v. Hollyway*, 41 Iowa, 200.

UNDER A BELIEF OF OWNERSHIP OR SECURITY.

If a defendant believes that he is getting his own property back, or security for it, then there is no felonious intent. *State v. Hollyway*, 41 Iowa, 200; *People v. Hall*, 6 Park. Cr. R., 642.

SNATCHING PROPERTY FROM ANOTHER.

The mere snatching a thing from a person has, in terms, never been considered robbery, but has been, in repeated cases, held not to be robbery. The snatching of a bundle from the hands of a boy in the street, was held not to be robbery. 1 Leach, 287; 6 Park. Cr. R., 651.

VIOLENCE—FORCE.

The property must be taken by violence to the person, which means more than an assault and battery; it must be sufficient to force the person to part with his property, not only against his will but in spite of his resistance. *McLosky v. People*, 5 Park. Cr. R., 308; *People v. Hall*, 6 Park. Cr. R., 652; *State v. Hollyway*, 41 Iowa, 200. But, under the statute of Iowa, the sudden snatching of a purse or other property from the hand, involves the force and violence sufficient to constitute robbery. *State v. Carr and Brown*, 43 Iowa, 418. The word "felonious" is not inserted like that in the New York statute.

OBTAINING PROPERTY BY EXTORTION OR THREAT.

Robbery may be committed by extorting personal property from the person, or in the presence of the owner, by means of threats of an unfounded criminal charge, where such property is obtained through fear produced by such threats; and such threats or charges need not be direct but may be made in unequivocal language. *People v. McDaniels*, 1 Park. Cr. R., 198. So where a man is knocked down and his pockets rifled, but the robbers found nothing except a slip of paper containing a memorandum, an indictment for robbing him of the paper was held to be maintainable. *People v. Loop*, 3 Park. Cr. R., 559. So the threatening to shoot or commit violence. *State v. Hollyway*, 41 Iowa, 200; 20 Am. R., 586; *Turner v. State*, 1 Ohio St., 422.

OWNERSHIP.

It is not necessary, to constitute robbery, that the property taken should belong to the person robbed. When the law speaks of the "personal property of another," it means other than the prisoner. *Brooks v. People*, 49 N. Y., 436, and authorities cited; 10 Am. R., 398.

EVIDENCE—TELEGRAPHIC COMMUNICATIONS

Are not privileged, and a telegraph operator is bound to testify to the contents of a message, if it be material and relevant. *State v. Litchfield*, Maine Supreme Judicial Court, 10 Am. Law Reg., 376.

DECLARATION AND STATEMENTS OF INJURED PARTY.

Immediate complaints of the crime and violence, made by the party robbed, are to be regarded as a part of the *res gestæ*, and proper to be shown by the persons to whom they were made. *Lambert v. People*, 29 Mich., 71.

BAR—FORMER ADJUDICATION.

A trial and acquittal for robbery is a bar to an indictment for larceny, where the property alleged to have been stolen is the same. *People v. McGowen*, 17 Wend., 386.

RUNNING THRESHING MACHINES WITHOUT
BOXED TUMBLING RODS.

LAWS OF 1874, CHAPTER 38, PAGE 29.

An Act to amend Section 4064, Code 1873. If any person run any threshing machine in this state without having the two lengths of tumbling rods next the machine, together with the knuckles or joints and jacks of the tumbling rods safely boxed and secured while the machine is running, he shall be deemed guilty of a misdemeanor, and be punished by fine of not less than ten nor more than fifty dollars, for every day or part of a day he shall violate this section. And any person who shall knowingly permit either his own grain, or any that may be in his possession, or under his control, to be threshed by a machine, the rods, knuckles, or joints of which are not boxed in accordance with the requirements of this section, shall be liable to a like fine as that prescribed for the person running such machine, both of which fines may be recovered in an action brought before any court of competent jurisdiction. [Limitation, by section 4168, one year. This offense being triable by a justice.]

Form of Information.

THE STATE OF IOWA } Before . . . , a justice of . . . county, Iowa.
VS. }
. } Information.

The defendant is accused of the crime of running a threshing machine without boxed tumbling rods: For that the said defendant on or about the . . day of . . 187., in the township of . . county of Linn, State of Iowa, did willfully and

unlawfully run and operate a threshing machine, the two lengths of the tumbling rods and knuckles next to the machine not being boxed or safely secured at the time said machine was running.

Or, knowingly permitted such machine to run and operate in the threshing of his grain, without the two lengths of the tumbling rods and knuckles being boxed, contrary to, and in violation of, law.

SAVINGS BANKS.

LAWS OF 1874, CHAPTER 60.

SECTION 20. It shall not be lawful for any bank, banking association or private bankers, to advertise or put forth a sign as a savings bank or savings institution; and any bank, banking association, or private banker, violating these provisions, shall forfeit and pay, for every such offense, the sum of one hundred dollars for every day such offense shall be continued, to be sued for and recovered in the name of the people of the state, in any court having cognizance thereof, for the use of the school fund.

SEC. 26. Every officer, agent, or clerk of any saving's bank organized under this act, who shall willfully and knowingly subscribe or make any false statements or false entries in the books of such bank, or shall knowingly subscribe or exhibit false papers with the intent to deceive any person authorized to examine as to the condition of said institution, or shall willfully and knowingly subscribe or make false reports, shall be deemed guilty of felony, and upon conviction thereof, shall be fined not exceeding ten thousand dollars, and be imprisoned in the state prison not less than two nor more than five years, and be forever after incapable of holding any office created by this act.

SEC. 27. Intentional fraud on the part of saving's banks organized under this act, or in deceiving the public or individuals in relation to their means, or their liabilities, or diversion of the funds of the bank to other objects than those mentioned in its certificate of incorporation, and the payment of dividends which leave insufficient funds to meet the liabilities of the bank, shall subject those guilty thereof to fine not less than five hundred dollars, or imprisonment of not less than one year, or by both such fine and imprisonment at the discretion of the court, and shall cause a forfeiture of all the privileges herein conferred, and the court may proceed to close the bank by an information in the manner prescribed by law.

SEC. 32. Any saving[s] bank organized under the provisions of this act is hereby prohibited from advertising in any way, either by publication or otherwise, any greater amount of capital than such banks *have* [has] actually paid in, and such bank shall be subject to a fine of twenty-five dollars for each and every violation of this section.

SEDUCTION.

SECTION 3867. If any person, seduce and debauch any unmarried woman of previously chaste character, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

SEC. 3868. If, before judgment upon an indictment, the defendant marry the woman thus seduced, it is a bar to any further prosecution for the offense.

SEC. 4560. The defendant in a prosecution for a rape, or for enticing or taking away an unmarried female of previously chaste character for the purpose of prostitution, or aiding or assisting therein, or for seducing and debauching any unmarried woman of previously chaste character, cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense. [Limitation, by section 4166, eighteen months.]

Form of Indictment.

THE STATE OF IOWA, } In District Court of . . . county, . . . term, 1878.
VS. } Seduction.
. } Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of seduction committed as follows: That the said . . . in the county of . . . and State of Iowa, did willfully, unlawfully and feloniously, seduce, debauch and carnally know one A. B., the said A. B., being then and there an unmarried female of previous chaste character, contrary to, and in violation of, law.

INDICTMENT—PREVIOUS CHASTITY.

The indictment should allege that the prosecutrix was of previous chaste character. *West v. State*, 1 Wis., 209. (The Wisconsin statute being similar to the Code of Iowa, both containing the words "of previous chaste character.")

ACTS CONSTITUTING SEDUCTION.

Acts of carnal intercourse with an unmarried woman, to which her assent was obtained by a promise of marriage, at the time, and to which, without such promise she would not have yielded, constitutes the offense. *People v. Millsbaugh*, 11 Mich., 278; *Kenyon v. The People*, 26 N. Y., 203; *Boyc v. People*, 55 N. Y., 645; *State v. Bierce*, 27 Conn., 319; *State v. Crawford*, 34 Iowa, 40.

LIMITATION—BAR—RENEWAL OF PROMISE.

Where a woman was seduced on a promise of marriage,

and such intercourse was afterward broken off, but was again renewed on another promise of marriage, the defendant is liable on such last promise. *People v. Millsbaugh*, 11 Mich., 278.

CHARACTER—CHASTITY OF PROSECUTRIX PRESUMED.

The chastity of the female is presumed, and the burden of proof to the contrary is on the defendant. *Andre v. State*, 5 Iowa, 389; *State v. Sutherland*, 30 Ib., 570; *State v. Higdon*, 32 Ib., 262; *Crozier v. The People*, 1 Park, Cr. R., 457; *People v. Kenyon*, 5 Park, Cr. R., 286; *Kenyon v. The People*, 26 N. Y., 204; *People v. Millsbaugh*, 11 Mich., 278; *People v. Brewer*, 27 Mich., 137. The case of *State v. West*, 1 Wis., 117, holds a contrary doctrine, where the statute contains the words "of previous chaste character." *People v. Clark*, 33 Mich., 112; 1 Am. Cr. R., 660.

PREVIOUS CHASTE CHARACTER—CONSTRUCTION OF.

By previous chaste character, is meant that which the person really is, in contradistinction to that which she may be reputed to be. *Andre v. The State*, 5 Iowa, 389; *Boak v. The State*, 5 Ib., 430; *Carpenter v. People*, 8 Barb., 603; *People v. Videtto*, 1 Park, Cr. R., 603; *Kenyon v. The People*, 26 N. Y., 203.

UNCHASTE CHARACTER.

The unchastity of a woman does not necessarily mean that she must have had sexual intercourse with a man. *Andre v. The State*, 5 Iowa, 389. One who would indulge in indecent and lewd talk, or would act in a manner inconsistent with virtue and propriety, is not of a chaste character as contemplated by law. *State v. Carron*, 18 Iowa, 375; *State v. Sutherland*, 30 Ib., 572.

UNCHASTE CHARACTER—PROOF OF.

It is not necessary in order to establish the unchaste character of a female, to show that she has had sexual intercourse. Her deportment, actions and conduct in life, are to be taken into consideration. *Andre v. The State*, 5 Iowa, 389.

CHASTITY—REFORMATION.

A female who has become unchaste, may reform and again

gain her character for chastity. 2 Whart., Secs. 2672-2673; *State v. Carron*, 18 Iowa, 372; *State v. Jones*, 16 Kansas, 608; *State v. Timmens*, 4 Minn., 325.

CHASTITY—IMPEACHMENT.

Evidence of the reputation of the moral character of prosecutrix, at the time of trial, is admissible, but is only applicable before the commission of the crime. *People v. Brewer*, 27 Mich., 134; *People v. Clark*, 83 Mich., 112; 1 Am. Cr. R., 660; 2 Green's Cr. R., 562.

CHARACTER OF PROSECUTRIX.

It is inadmissible to show that the prosecutrix was raised in a house of ill-fame of which her mother had control, unless she, the prosecutrix, was a prostitute. *Kenyon v. The People*, 26 N. Y., 209.

DEFENSE—MARRIED MEN.

The fact that the defendant was a married man is not necessarily a complete defense; it is a matter for the jury in determining the character and purity of the prosecutrix. *State v. Groome*, 10 Iowa, 314; *Wood v. The State*, 48 Ga., 192; 15 Am. Reps., 664.

PROOF—CORROBORATING EVIDENCE.

The corroborating evidence referred to by statute is not confined solely to the fact of illicit intercourse, but extends to prove other material facts, such as the illegitimacy of a child, the regular and frequent visits, defendant's confessions, etc. *Andre v. The State*, 5 Iowa, 389; *State v. Kingsley*, 39 Ill., 439; *Kenyon v. The People*, 26 N. Y., 203; *Boyce v. The People*, 55 N. Y., 644.

ARTS AND DECEPTION.

The kind and extent of seductive arts necessary to be shown, depends upon the circumstances of each case. *State v. Higdon*, 32 Iowa, 262.

DEFENSE—EXCUSE—PALLIATION.

The fact that after consenting to sexual intercourse on a promise of marriage, the prosecutrix endeavored to persuade him to desist, and at a time when it was too late to withdraw

a marriage promise without defendant's consent, any offers she makes not to hold defendant to his promise is no defense or palliation. *Boyce v. The People*, 55 N. Y., 644.

EVIDENCE—EXAMINATION OF WITNESSES.

Where the State introduces the prosecuting witness she may, on cross-examination, be examined in matters showing her want of chastity. *State v. Sutherland*, 30 Iowa, 570.

Proof of intercourse with another than the defendant after the alleged seduction, is incompetent. *Boyce v. The People*, 55 N. Y., 644.

REBUTTING BY STATE.

The chaste character of prosecutrix being presumed, where the defendant introduces evidence to impeach such character, it is proper for her to rebut such evidence, establishing her good character up to the time of the occurrence with defendant. *State v. Shean*, 32 Iowa, 88.

PRESUMPTION.

It will be presumed that upon a trial for seduction, the testimony of the prosecutrix will be given, as far as possible, for the purpose of shielding herself, and her language, therefore, should not receive a strained construction in order to sustain a verdict of guilty. *State v. Haven*, 43 Iowa, 181.

FORCE—SEDUCTION—RAPE.

If the act of sexual intercourse was accomplished by force, it is rape and not seduction. *State v. Kingsley*, 39 Iowa, 439.

INSTRUCTION—CHASTE CHARACTER.

An instruction to the jury that the previously chaste character of the prosecutrix was presumed, but such presumption could be rebutted or proven by admitted facts or the circumstances in the case, held to be correct. *State v. Bowman*, 45 Iowa, 418.

SEINING AND DESTROYING FISH.

LAWS OF 1874, CHAPTER 50.

SECTION 5. It shall be the duty of any person or persons, or corporations, hereafter erecting or constructing any dam in any of the rivers within the state, or their tributaries accessi-

ble to migratory fishes, to put in or upon the same, fish ways, under the direction and approval of said fish commissioners, without which every such dam shall be deemed a public nuisance, and liable to be abated upon the information of any one complaining; and the person or persons constructing a dam in violation of this section, shall be liable to a fine of ten dollars for each day such dam shall be continued without a fish-way, such as shall be required by the commissioner under this act.

AN ACT to provide for the Construction and Maintenance of Fish-ways to enable fish to pass over dams across the rivers and streams of the State of Iowa.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That the owner or owners of any dam or obstruction across any river or stream, creek, pond, lake, or water-course in this State, shall, within a reasonable time, erect, construct and maintain, over or across said dam or obstruction, a suitable fish-way of suitable capacity and facility to afford a free passage for fish up and down through such water-course when the water of said stream is running over the said dam.

SEC. 2. Any dam or obstruction mentioned in section one of this act, not provided with such fish-way within a reasonable time after the taking effect of this act, is hereby declared a nuisance, and may be abated accordingly.

SEC. 3. Any person guilty of the violation of the provisions of this act, shall, upon conviction before a justice of the peace, be fined not less than five nor more than fifty dollars for the first offense, and not less than twenty dollars for each subsequent offense, and shall stand committed until such fine is paid.

SEC. 4. This act, being deemed of immediate importance, shall be in force and take effect from and after its publication in the Daily State Register, and Daily State Leader, newspapers published in Des Moines, Iowa.

Approved, March 26, 1878.

I hereby certify that the foregoing act was published in the Iowa State Register, April 3, and in the Iowa State Leader, April 6, 1878.

JOSIAH T. YOUNG, *Secretary of State.*

SEC. 6. No person shall place, erect, or cause to be placed or erected across any of the rivers, creeks, ponds, or lakes, within the State, any dam, seine, net, weir, fish-dam, or other obstruction in such manner as shall hinder or obstruct the free passage of fish up or down through such water or water-courses; and from and after the passage of this act it shall be unlawful for any person to use any seine or net for the purpose

of catching fish, except minnows, in any of the waters of the state, the meshes of which seine are less than two inches, and no person shall be permitted to seine any fish except during the months of July, August, and September, except minnows.

SEC. 7. Any person found guilty of the violation of the provisions of section six of this act shall, on conviction before a justice of the peace of the township in which he resides, or where the offense be committed if arrested therein, be fined not less than ten nor more than fifty dollars for the first offense, and for the second or any subsequent offenses not less than twenty dollars, and shall stand committed till such fine be paid.

SEC. 8. No person shall place in any of the waters of the state any lime, ashes, drug, or medicated bait, with intent thereby to injure, poison, or catch fish. Any person violating the provisions of this section shall be punished as provided in section seven of this act.

SEC. 9. It shall not be lawful to fish with nets or any other method of entrapping fish, except with hook and line, or spear, or in the ordinary manner of fishing, within half a mile of any dam in which there is or may be constructed a fish way, for the purpose of the passage of fish up and down any stream in the state. Any person found guilty of the violation of the provisions of this section shall, on conviction, be fined as provided in section seven of this act.

SEC. 4054. Any person who shall go upon the premises of any person or corporation, whether enclosed or not, and shall be found seeking to take, by any means whatsoever, except a hook and line, any fish, shall be deemed guilty of trespass, and may be prosecuted in the name of the State of Iowa by any person in possession of said premises, before any justice of the peace or other court of competent jurisdiction, and fined in any sum not less than five nor more than fifty dollars. [Limitation, by section 4169, one year.]

Form of Information.

THE STATE OF IOWA, } In Justices Court, before . . . , a justice of . . . county.
vs. }
. } Information.

The defendant is accused of the crime of failing to erect a fish way in a dam: For that the said defendant, on or about the . . . day of . . . , 1873, in the township of . . . and county of . . . and State of Iowa, did willfully and unlawfully erect and construct a certain dam in and across a certain stream known as Indian Creek in said township, the said stream being accessible to migratory fish, without putting therein a fish way, thereby obstructing the free passage of fish up and down through said stream, contrary, etc.

Or, if the dam has been erected by some other person then allege that the defendant uses, occupies and has control of the same without a fish way, etc.

By the laws of 1876, chapter 70, page 57, sections 6 and 7 of chapter 50, laws of 1874, are amended to read as follows: The same language is used in section 6 up to the words "catching fish," then is added: "except minnows that are natives of the waters of the state; *provided*, always, that it shall be lawful for the Fish Commissioner to take fish in any of the public waters at any time, and by any method, for the purpose of propagation, or for the purpose of exchanging with Fish Commissioners of other states or of the United States. Nothing in this section shall be so construed as to prohibit the erection of dams for manufacturing purposes, as now provided by law."

SEC. 7. Any person found guilty of a violation of the provisions of section six of this act, shall, upon conviction before a justice of the peace, be fined not less than five nor more than fifty dollars for the first offense, and for the second or any subsequent offense, not less than twenty dollars, and shall stand committed until such fine be paid.

LAWS OF 1876, PAGE 57.

SECTION 4. Persons raising or propagating fish on their own premises, or owning premises on which there are waters having no natural outlet, supplied with fish, shall absolutely own said fish, and any person taking fish therefrom, or attempting to take fish therefrom without the consent of the owner, or his agent, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than twenty-five dollars, nor less than five dollars, or imprisoned in the county jail not more than thirty days, and shall be liable to the owners of the fish in damages in double the amount of damages sustained, the same to be recovered in a civil action before any court having jurisdiction over the same.

SEC. 6. It shall be unlawful to catch and kill any bass or wall-eyed pike between the first day of April and the first day of June, or any salmon or trout between the first day of November and the first day of February, of any year in any manner whatever.

SEC. 7. Any person found guilty of a violation of section six of this act, shall, on conviction before a justice of the peace, be fined not less than five dollars nor more than twenty-five dollars for each offense, and shall stand committed until such fine be paid.

LAWS OF 1878, CHAPTER 80.

AN ACT Entitled "An act to Promote Fish Culture in the State of Iowa, and to Amend and Consolidate the Enactments heretofore passed for that purpose, Amending Chapter 70, Acts of the Sixteenth General Assembly.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That the governor of the State is hereby authorized and required to appoint, after the expiration of the term of the present incumbent, and biennially thereafter, one competent person, who shall be known as the State Fish Commissioner, who shall hold his position for the term of two years; and any vacancy that may occur, for the unexpired term, or by reason of the expiration of the term of said office, shall be filled by the appointment and commission of the governor.

The general duties of said commissioner, including the present incumbent, shall be to have general charge and superintendence of the state hatching house, now located at Anamosa, to forward the restoration of fish to the rivers and waters of the State, and to stock the same with fish from said hatching house, and elsewhere, to the extent that means therefor may be furnished by the State, and to the extent that means for that purpose may be furnished by the United States Fish Commissioner, and by societies and individuals interested in the propagation of fish in the waters of this State.

SEC. 2. The fish commissioner, including the present incumbent, shall receive, in full compensation for his services, twelve hundred dollars per year, to be paid out of any money in the state treasury not otherwise appropriated.

SEC. 3. That for the purpose of carrying out the provisions of this act, and continuing the work as contemplated in laws of 1876, chapter 70 thereof, there is hereby appropriated out of any money belonging to the State, not otherwise appropriated, the sum of six thousand dollars, or so much thereof as may be necessary to carry out the provisions of this act: *Provided*, That said amount be under the control of the executive council of the State.

SEC. 4. That it shall be the duty of said fish commissioner to make a detailed, itemized and sworn statement, on or before two years after the 15th day of November, 1877, and every two years thereafter, showing the amount of money expended, for what purpose or purposes expended, the number and kinds of fish distributed, together with such general information on the subject of fish culture as such commissioner

may think proper; and upon the submission of such report, and each subsequent, the same shall be caused to be printed and distributed to the same extent and in the same manner as now provided by law for the printing and distribution of the reports of public officers of the State.

SEC. 5. No person shall place, erect, or cause to be placed or erected, across any of the rivers, creeks, ponds or lakes of this State, any trot line, dam, seine, weir, fish dam, or other obstruction, in such manner as to prevent the free passage of fish up, down or through such water courses, unless the same be done by the instruction or under the direction of the fish commissioner, and that when the same is so done by or through the instruction, or under the direction of the fish commissioner, it shall be unlawful for any person or persons to remove, or in any way interfere with the same. This section shall not be construed to prohibit the erection of dams for manufacturing purposes as provided by law.

SEC. 6. Any person found guilty of a violation of the provisions of section five of this act, shall, upon conviction before a justice of the peace, be fined not less than twenty-five, nor more than one hundred dollars, or imprisoned in the county jail not less than ten days, nor more than thirty days, in the discretion of the court.

SEC. 7. All acts or parts of acts in conflict herewith are hereby repealed.

SEC. 8. This act, being deemed of immediate importance, shall take effect and be in force from and after its publication in the Iowa State Leader and Iowa State Register, newspapers published at Des Moines, Iowa.

Approved, March 23, 1878.

I hereby certify that the foregoing Act was published in the Iowa State Register March 29, and in the Iowa State Leader March 30, 1878.

JOSIAH T. YOUNG, *Secretary of State.*

NEGLECTING TO ERECT A FISH WAY.

The maintenance of dams without fish ways in an innavigable river, thereby obstructing the passage of migratory fish, is an indictable offense at common law. And no right will be acquired as against the State by the obstruction of a public fishery, though continued for more than twenty years, under a claim of right, if such obstruction, in fact, originated without right. *State v. Franklin Falls Company*, 49 N. H., 240; 6 Am. R., 513, and authorities cited.

SELLING DRUGGED LIQUORS AND DILUTED MILK.

SECTION 4040. If any person willfully sell, or keep for sale, intoxicating, malt, or vineous liquors, which have been adulterated or drugged by admixture with any deleterious or poisonous substance, he shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the penitentiary not exceeding two years.

SEC. 4042. If any person knowingly sell to another, or knowingly deliver or bring to be manufactured to any cheese or butter manufactory in this state, any milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, of milk commonly known as "skimmed milk," or shall keep back any part of milk known as "strippings" with intent to defraud, or shall knowingly sell the milk, the product of a diseased animal or animals, or shall knowingly use any poisonous or deleterious material in the manufacture of cheese or butter, he shall, upon conviction thereof, be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and be liable in double the amount of damages to the person or persons, firm association, or corporation, upon whom such fraud shall be committed. [Limitation for section 4040, is three years by section 4167, and for section 4042 is one year by section 4168.]

Form of Indictment under Section 4040.

THE STATE OF IOWA, } In District Court of . . . county, . . . term, 1878.
vs. }

Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of selling drugged liquors, committed as follows: The said . . . , in the county of . . . , and State of Iowa, on or about the . . . day of . . . , 1878, being a druggist, and having for sale intoxicating and vinous liquors, did willfully and knowingly keep for sale malt liquors, to-wit: whisky which was adulterated by admixture with a deleterious and poisonous substance, to-wit: fusil oil, contrary, etc.

Or, under section 4042.

. . . did on . . . at . . . , knowingly and unlawfully sell to one A B, one hundred pounds of milk for the purpose of being manufactured into cheese by the said A B, the same being brought and delivered to the said A B at his cheese factory at Springfield, county and State aforesaid, by the said defendant, the said milk being then and there at the time adulterated and diluted with water, contrary, etc.

SELLING OBSCENE BOOKS, PICTURES, ETC.

SECTION 4022. If any person import, print, publish, sell, or distribute, any book, pamphlet, ballad, or any printed paper containing obscene language or obscene prints, pictures, or descriptions manifestly tending to corrupt the morals of youth;

or introduce into any family, school, or place of education; or buy, procure, receive or have in his possession any such book, pamphlet, ballad, printed paper, picture, or description, either for the purpose of loan, sale, exhibition, or circulation; or with intent to introduce the same into any family, school, or place of education, he shall be punished by imprisonment in the county jail not more than thirty days or by fine not exceeding one hundred dollars. [Limitation by section 4168, one year.]

Form of Information.

THE STATE OF IOWA, } Before . . . , a justice of . . . county, Iowa.
vs. }

Information.

The defendant is accused of the crime of selling obscene books: For that the said defendant on the . . . day of . . . , 1878, in the township of . . . , county of . . . , and State of Iowa, did unlawfully sell to one L F a certain lewd, obscene and licentious pamphlet, the title of which was "Married Women," representing a man in an obscene and indecent posture with a woman, both being nude, contrary to, and in violation of, law.

This form will answer for the other violations of this section, with the necessary alterations.

INDICTMENT—DESCRIPTION OF OBSCENE BOOK.

It is not required to set out a copy or particularly describe the book or pamphlet; a general description is sufficient. It can never be required that an obscene book and picture should be displayed upon the records of the court. Such a proceeding would require the public itself to give permanency and notoriety to indecency, in order to punish it. If the defendant is the publisher he must be presumed to have been advised of the contents of the libel, and fully prepared to justify it. *Commonwealth v. Holmes*, 17 Mass., 336; *People v. Girardin*, 1 Mich., 90.

Under an English statute it was held proper for the court to order the obscene books or pamphlets found to be such, in violation of law, to be destroyed. 20 and 21 Vict., chapter 83, section 1; *Reg. v. Hicklin*, Law Reports, 3 Queen's Bench, 360; 2 Greene's Cr. R., 46.

**SELLING UNWHOLESOME PROVISIONS, AND
ADULTERATING FOOD, LIQUORS AND
MEDICINES.**

SECTION 4035. If any person knowingly sell any kind of diseased, corrupted, or unwholesome provisions, whether for meat or drink, without making the same fully known to the buyer, he shall be punished by imprisonment in the county

jail not more than thirty days, or by fine not exceeding one hundred dollars.

SEC. 4036. If any person fraudulently adulterate for the purpose of sale, any substance intended for food, or any wine, spirituous or malt liquors, or other liquor intended for drinking, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding three hundred dollars, and the article so adulterated shall be forfeited and destroyed.

SEC. 4037. If any person fraudulently adulterate, for the purpose of sale, any drug or medicine in such manner as to lessen the efficacy, or change the operation of such drugs or medicines, or to make them injurious to health; or sell them knowing that they are thus adulterated, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, and such adulterated drugs and medicines shall be forfeited and destroyed. [Limitation to section 4168, one year; and section 4167, applies to the provisions of 4036 and 4037, being three years.]

Form of Information under Section 4035.

THE STATE OF IOWA, } Before . . . , a justice of . . . county, Iowa.
VS. }

Information.

The defendant is accused of the crime of selling unwholesome food: For that the said defendant, on or about the . . . day of . . . , 1878, in the township of . . . county of . . . , and State of Iowa, did unlawfully and knowingly sell to one L. S., as food for man, for the price of two dollars, twenty pounds of meat of a certain hog which hog had died by disease, to-wit: hog cholera, which he, the said defendant, then and there knew at the time, contrary, etc.

Form of Indictment under Section 4036.

THE STATE OF IOWA } In District Court of . . . county . . . term, 1878.
VS. }

Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of adulterating food: that the said . . . , on or about the . . . day of . . . , 187 . . . , in the county of . . . , and State of Iowa, did unlawfully and fraudulently, for the purpose of sale, adulterate a certain quantity of Japan tea, intended for drink, to-wit: one pound, by then and there adding to and mingling with said tea one-half pint of dried blackberry leaves, thereby adulterating said tea, contrary, etc.

Or, by section 4037 for adulterating medicines, use the same form substantially, with the words, "adulterate certain drugs, to-wit: one ounce of quinine, by then and there adding and mixing therewith one-half an ounce of common wheat flour, contrary to and in violation of law."

Under the common law, as well as by most of the statutes, it is an offense to sell unwholesome provisions, or to mix noxious ingredients in any provisions. *Rex v. Dixon*, 3 M. & S., 11; *Rex v. Stevenson*, 3 F. & F., 106; *Rex v. Jarvis*, 3 F. & F., 108, 109; 2 Black., 162; 2 Russ. on Crimes, 286; *Rex v. Dixon*, 4 Campbell, 12.

INDICTMENT—SUFFICIENCY OF.

The indictment need not allege that the food was sold or delivered to be eaten. The allegation that the defendant sold the beef to divers citizens "as good and wholesome beef and food," means that he sold it to such citizens to be eaten by them. It is said, "it would be absurd to hold that the language of the indictment authorizes the conclusion that such citizens may have purchased the beef for their dogs, or for any purpose except for themselves or families to eat." *Goodrich v. People*, 19 N. Y., page 577. But it would be well enough to allege that it was sold as food for man. 1 Denio, 387; 3 Maul. & Sel., 11; 2 East. P. C., 821; 3 Johnson Cases, 265, 267; 2 Iredells R., 40.

ALLEGATION—UNWHOLESOME.

It is not necessary to set forth *what* rendered the meat unwholesome, or to state that the defendant intended to injure the health of the persons who ate it, or that it did injure their health. *Goodrich v. People*, 19 N. Y., 577; 2 East. P. C., 822; 3 M. & S., 16.

EVIDENCE—EXAMINATION OF WITNESSES.

It is proper to show that the defendant's attention had been called to the condition of the meat to prove knowledge. So it was proper to show by physicians, that the eating of diseased meat does not always cause apparent sickness. It was also proper for the physician to give his opinion, from the description which other witnesses gave of the sore on the cow's head, as to the nature of the disease which the cow had, and that it would cause fever; and that the flesh of animals laboring under a fever is unwholesome. *Goodrich v. People*, 19 N. Y., 574.

SALE FOR MERCHANDISE.

The fact that unwholesome food, as in this case of beef, was sold as merchandise, again to be sold and not for domestic consumption to any particular person, but at wholesale, to be sold again, to such as wish to purchase, is no defense to a charge of selling unwholesome food. The sale is illegal whether in bulk, or to persons generally at retail. *People v. Parker*, 38 N. Y., 85.

SETTING OUT FIRES.

SECTION 3889. If any person willfully, or without using proper caution, set fire to and burn, or cause to be burnt, any prairie or timbered land by which the property of another is injured or destroyed, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or by both fine and imprisonment at the discretion of the court, with the costs of conviction, or by imprisonment in the county jail not exceeding thirty days; and should any person be found guilty of a second violation hereof, he shall be fined not less than ten dollars and costs of conviction, or imprisonment as above provided. [Limitation, by section 4161, three years.

LAWS OF 1878, CHAPTER 55.

AN ACT to repeal Section 3889 of Chapter 3, Title 24 of the Code, in relation to Setting out Fires, and to enact a substitute therefor.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That section 3889, of chapter 3, title 24, of the Code of 1873 be, and the same is, hereby repealed, and the following enacted in lieu thereof:

SECTION 3889. If any person willfully, or without using proper caution, set fire to and burn, or cause to be burned, any prairie or timbered land, or any enclosed or cultivated field, or any highway, by which the property of another is injured or destroyed, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or by both fine and imprisonment, in the discretion of the court.

Approved, March 16, 1878.

Form of Indictment.

THE STATE OF IOWA, } District Court of the county of term, 1878.
vs. }

Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of willfully setting out fire, committed as follows: The said . . . , on or about the . . . day of . . . , 187 . . . , in the county of . . . and State of Iowa, did willfully and without using proper care, set on fire a certain prairie in said county and state situate, and called "High Prairie," said prairie being in an inhabited part of said county of Linn; and the said J S, not being the owner of said prairie, and by reason of which the property of one S F, to-wit: one stack of hay, was destroyed, he, the said S F, being an adjoining owner of said prairie, contrary to and in violation of law.

SEC. 3890. If any person set fire to and burn, or cause to be burned, any prairie or timber land, and allow such fire to escape from his control, between the first day of September in any year, and the first day of May following, he shall be deemed guilty of misdemeanor, and upon conviction thereof,

shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. [Limitation, by section 4168, one year.]

Form of Information.

THE STATE OF IOWA, } Before . . . , a justice of . . . county, Iowa.
vs. }

. } **Information.**
. did, between the first day of September, 1876, and the first day of May, 1877, set fire to and cause to be burned, a certain piece of prairie land in said county and state aforesaid, known and designated as "Shepherd's Prairie," and then and there allowed said fire to escape beyond his control, between the dates above stated, contrary to, and in violation of, law.

It is held, in civil cases, that where a party willfully, carelessly, or negligently sets out fire, and it escapes into another's property, he is liable for the damages resulting from his act, and it is not necessary, in order to fix his liability, that the act should have been done with intent to injure the party complaining. *Jacobs v. Andrews*, 4 Iowa, 506; *De Franco v. Spencer*, 2 G. Greene, 462; *Hanlon v. Ingram*, 3 Iowa, 81.

A person setting out fire between the first day of September and May first following, is *absolutely* liable for damages caused by its escape on to the premises of another, regardless of the question of diligence. *Conn v. May*, 36 Iowa, 241.

SODOMY.

Sodomy, sometimes called "buggery," and sometimes the "offense against nature," is defined as being a carnal copulation by two human beings with each other against nature, or by a human being with a beast. 1 Bishop's Crim. Law, 548, section 948, 4th ed. Unlike rape, sodomy may be committed between two persons, both of whom consent; so husband and wife can perpetrate this offense together; so can two men, or a boy and a man. 2 Bishop Crim. Law, 649, section 1173, 4th ed. See, also, Roscoe's Cr. Ev., marginal page 944, 7th ed.

Sodomy is not a crime under the laws of Iowa, and not punishable as such. *Estes v. Carter*, 10 Iowa, 400.

SUPPRESSION OF ANY LAST WILL.

SECTION 4075. If any person having in his possession, or under his control, any last will and testament of any deceased person, willfully suppress, secrete, deface, or destroy the same,

any codicil thereto belonging, with intent to injure or defraud any devisee, legatee, or other person, he shall be punished by imprisonment in the penitentiary not more than seven years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA, } In the District Court of . . . county, . . . term, 1878.
vs. }

Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of suppressing the last will of a deceased person, committed as follows: That the said . . . on or about the . . . day of . . . , 187 . . . , in the county of . . . and State of Iowa, did have in his possession and under his control for safe keeping, and for the use of the testator and his heirs, a certain will purporting to be the last will and testament of one A L, placed in the hands of the said defendant by said testator, and while in his possession on said . . . day of . . . , within and for said county and State, did then and there willfully and lawfully suppress said will, with intent then and there, to injure and defraud A B, D, and E F, legatees of said A L, deceased, contrary to, and in violation of law.

STIRRRING UP QUARRELS.

SECTION 3964. If any judge, justice of the peace, clerk of any court, sheriff, coroner, constable, attorney or counselor at law, encourage, excite, or stir up any suit, quarrel, or controversy between two or more persons, with intent to injure such person or persons, he shall be punished by fine not exceeding five hundred dollars, and shall be answerable to the party injured in treble damages. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA, } In District Court of . . . county, . . . term, 1878.
vs. }

Indictment.

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of unlawfully encouraging suits, committed as follows: The said . . . on or about the . . . day of . . . , 187 . . . , in the county of . . . and State of Iowa, then and there being a justice of the peace of Marion Twp., county and State aforesaid, and acting as such, did on the day aforesaid, unlawfully and willfully encourage, excite, and stir up a suit between one A, as plaintiff, and one B, as defendant, by then and there advising and encouraging the said A, in bringing a certain action in replevin before him as such justice of the peace, against the said B, well knowing at the time that the said A, had no cause of action against the said B, but encouraged and advised the commencement of said action with intent, then and there to injure the said B, contrary to, and in violation of, law.

A barrator is defined to be a common mover, exciter or maintainer of suits or quarrels, either in courts or in the country, and it is said not to be material, whether the courts be of record or not, or whether such quarrels relate to a disputed title or possession or not; but that all kinds of disturbances of the peace, and the spreading of false rumors and calum-

nies, whereby discord and disquiet may grow amongst neighbors, are as proper instances of barratry as the taking or keeping possession of lands in controversy. But a man is not a barrator or in a respect of any number of false actions brought by him in his own right, unless, as it seems, such actions should be entirely groundless and vexatious, without any matter of color. Nor is an attorney a barrator, in respect of his maintaining his client in a groundless action to the commencement of which he was in no wise privy. Hawk P. C., page 1, chapter 81. Barratry is a cumulative offense, and the party must be charged as a common barrator. It is, therefore, insufficient to prove the commission of one act only. Hawk P. C., chapter 81; 6 Mod., 262; Roscoe's Crim. Ev., 7th ed., marginal page 314.

ELEMENTS—NUMBER OF ACTS.

Whether three acts of barratry constitutes the perpetrator of them a common barrator, *quære?* *Com. v. McCullough*, 15 Mass., 227.

SUFFERING PRISONER TO ESCAPE.

SECTION 3953. If any jailor or other officer voluntarily suffer any prisoner in his custody upon a charge, or conviction of a felony, punishable by imprisonment for life, to escape, he shall be punished by imprisonment in the penitentiary not more than ten years, nor less than one year.

SEC. 3954. If any jailor or other officer voluntarily suffer any prisoner in his custody upon charge or conviction of any other felony to escape, he shall be punished by imprisonment in the penitentiary not more than eight years, or by fine not more than one thousand dollars.

SEC. 3955. If any jailor or other officer suffer any prisoner in his custody upon charge or conviction of any public offense to escape, he shall be punished by fine not exceeding one thousand dollars and by imprisonment in the penitentiary not exceeding five years. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA	}	District Court of the county of term, 1878.
VS.		
.	}	<i>Indictment.</i>
.		

The grand jury of the county of . . . , in the name and by the authority of the State of Iowa, accuse . . . of the crime of . . . , suffering a prisoner to escape, committed as follows: The said . . . , on or about the . . . day of 187 . . , in the county of . . . , and State of Iowa, then and there being the sheriff and jailor of

. . . county, Iowa, and having then and there in his charge, one B, by virtue of a certain warrant of commitment issued by the District Court of Linn county, Iowa, on a conviction of a felony, to wit: murder, and having the said B then and there in his custody by virtue of said warrant, did then and there unlawfully, willfully and voluntarily suffer said B, prisoner as aforesaid, to escape, contrary to, and in violation of, law.

The same form may be used with slight changes for violations under sections 3954 and 3955.

SWINDLING.

LAWS OF 1876, CHAPTER 30, PAGE 23.

SECTION 1. That whoever by the means of three-card monte so called, or any other form or device, sleight of hand or other means whatever, by use of cards or instruments of like character, obtains from another person any money or other property of any description, shall be deemed guilty of the crime of swindling, and shall, on conviction thereof, be punished by fine not less than two hundred nor more than two thousand dollars, or by imprisonment in the penitentiary not less than two years nor more than five years, or by both such fine and imprisonment in the discretion of the court. All persons aiding, encouraging, advising or confederating with, or knowingly harboring or concealing any such person or persons, or in any manner being accessory to the commission of the above described offense, or confederating together for the purpose of playing such games, shall be deemed principals therein, and punished accordingly.

SEC. 2. The jurisdiction of all the offenses described in section one (1) of this act which shall be committed on any railroad car, coach, train, boat, or other public conveyance, or in or at any railroad station or depot shall be in any county through which said car, coach, train, boat, or other public conveyance may pass during the trip or voyage, or in which the trip or voyage, may begin or terminate, and in all other cases the jurisdiction shall be in the county in which the offense is committed.

SEC. 3. Every person shall possess the power and authority, and it shall be the duty of every conductor, or other employee on any railroad, car or train, and of every captain, clerk, or other employee or [on] any boat, or station agent at any railway depot, or the officers of any fairs or fair grounds, or the proprietors of any place of public resort, and other [their] employees, with or without warrant to arrest any person or persons whom they or either of them shall find in the act of committing any of these offenses mentioned in the first section of this act, or any person or persons, whom he or they may have good reason to believe to have been guilty of the

commission of the said offenses, and to take such person or persons before a magistrate in any county where jurisdiction to try said offenses exists by virtue of this act, and deliver such person or persons so arrested to the magistrate, and make written complaint under oath of the facts. And for executing the powers conferred by this section the person making the arrest shall possess the same powers in all respects as are exercised by officers with warrants, including the power to summon assistance; and it shall be the duty of the person making such arrest to also arrest the person injured or defrauded by reason of the commission of any of the offenses mentioned in section one (1) of this act, and take such person before the examining magistrate, who shall require such person to give security to appear and testify on the trial of the cause, and such person or persons shall not be deemed to be guilty of the offense mentioned in section one (1) of this act, nor of the offense of gambling, unless such person or persons shall have failed to appear and give evidence on the trial. And the persons performing the services required by this act shall receive the same compensation as sheriffs receive for like services.

SEC. 4. It shall be the duty of any conductor, captain, hotel or saloon keeper, proprietor or manager of any public conveyance or place of public resort, and the officers of any fair or fair grounds, to eject from his car, train, boat, hotel, saloon, public conveyance, fair ground, or place of public resort, any person known to him or whom he has good reason to believe to be a three-card-monte-man, or who offers to wager or bet money or other valuable thing, upon what is commonly known as three-card-monte, or bet on any trick, or game with cards or other gaming device, and for such ejection no action for damages shall be maintained. And any parties operating any public conveyance by which passengers are carried, shall keep posted up a copy of this law in such conveyance.

SEC. 5. Any conductor of a railroad train, captain of any steamboat, proprietor or manager of any public conveyance, officer of any fair or fair grounds, or place of public resort, any hotel or saloon keeper, or their agents or employes, who shall fail, neglect, or refuse to perform the duties herein mentioned, or who shall knowingly suffer or permit a violation of this act, shall be deemed guilty of a misdemeanor and the jurisdiction of such offense shall be the same as that provided in section two of this act.

SEC. 6. Any person may be convicted for violation of section number one (1) of this act, on his own confession out of court, or upon the testimony of an accomplice.

TELEGRAPH OPERATORS.

SECTION 1328. Any person employed in transmitting messages by telegraph, must do so without unreasonable delay, and any one who willfully fails thus to transmit them, or who intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person except him to whom it is addressed, or to his agent or attorney, is guilty of a misdemeanor. [Limitation, by section 4168, one year.]

There being no punishment prescribed for the violation of the above section, the same comes within the provisions of section 3967 of the Code. Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of the State, shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. It is, therefore, an indictable misdemeanor.

Form of Indictment.

THE STATE OF IOWA, } In District Court of . . . county, . . . term, 1878.
vs. }
. } *Indictment.*

That C D, on . . . , at . . . , did deliver to the said A B, he, the said A B, being then and there the acting agent and telegraph operator for the Western Union Telegraph Company, at M, Iowa a certain written message directed to . . . , and in words and figures following [here copy telegram] to be transmitted and forwarded at once to said . . . , which the said A B willfully and unlawfully failed to do, contrary, etc.

Or, did willfully and unlawfully transmit a certain message, erroneously, to . . . delivered to him by . . . , as the telegraph operator of the Western Union Telegraph Company, at M, written as follows [here insert telegram], which he, the said A B, willfully and erroneously delivered as follows [here show to whom it was delivered], contrary, etc.

ELEMENT CONSTITUTING THIS CRIME.

The production of a telegram, in pursuance of a subpoena or order of court in a judicial proceeding, does not constitute the unlawful exposure of a telegram so as to constitute a violation of law. 2 Parson's Select Cases, 274; Allen's Telegraph Cases, page 1.

WITNESS—EVIDENCE—PRIVILEGED COMMUNICATION.

A witness is compelled to produce or disclose the contents of a telegram when done in a judicial proceeding on a subpoena or by order of court. 2 Parson's Select Cases, 274; Allen's Telegraph Cases, page 1.

OPERATORS—WITNESSES.

An operator is bound to testify to the contents of a message if it be material. *State v. Litchfield*, 10 Am. Law Register, 376.

THREATENING THE COMMISSION OF AN OFFENSE.

SECTION 4115. Whenever complaint is made before a magistrate, that any person has threatened to commit any public offense punishable by the laws of this State, and such magistrate is satisfied that there is reason to fear the commission of such offense, he may issue a warrant for the arrest of the person complained of; and the officer to whom the same shall be delivered for service, shall forthwith arrest and bring the accused before such magistrate; or, in case of his absence or inability to act, before the nearest and most accessible magistrate of the same county. When the name of the person complained of is unknown, he may be designated in the warrant by any name, and the warrant issued in pursuance hereof may be executed by any peace officer in any county of the State; *provided*, that when issued by a magistrate other than by a judge of the supreme, district or circuit courts, it cannot be served in any county other than that in which it is issued, unless authenticated as is required in case of a warrant of arrest issued on a preliminary information.

SEC. 4116. When the person arrested is taken before a magistrate other than the one who issued the warrant, the peace officer who executed the same, and who has charge of the person arrested, must, at the same time, deliver to the magistrate before whom the person arrested is taken, the warrant with his return indorsed and subscribed by him, and the complaint and other affidavits, if any, on which the warrant was issued, must be sent to the magistrate before whom the person arrested is taken, and if they cannot be procured, the complainant and his witness, if any, must be subpœnaed, if necessary, by the magistrate before whom the person arrested is taken, to appear before him and make a new complaint and affidavits.

SEC. 4117. When the person complained of is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto. The evidence must be reduced to writing and subscribed by the witnesses.

LAWS OF 1878, CHAPTER 35—CHANGE OF VENUE.

AN ACT to Amend Section 4117, Title 25, Chapter 4 of the Code: "Of Security to Keep the Peace."

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That section 4117 of the Code be and is hereby amended by inserting after the word "thereto," in section 4117, the following: "And a change of venue may be had as in preliminary examinations."

Approved March 12, 1878.

SEC. 4118. If it appear that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged, and the complainant may be ordered to pay the costs of the proceeding if the magistrate regards the complaint as unfounded and frivolous, and, unless when the proceeding is before a judge of the supreme, district, or circuit court, may issue execution therefor, and when the proceeding is before a judge of the supreme, district, or circuit court, he shall transmit the complaint, affidavits, warrant, and order, to the clerk of the district court of the county, who shall file the same, make a memorandum thereof in the judgment docket, and issue execution therefor immediately.

SEC. 4119. If there be just reason to fear the commission of the offense the person complained of shall be required to enter into an undertaking in such sum as the magistrate may direct, with one or more sufficient sureties, to abide the order of the district court of the county at the next term thereof, and in the meantime to keep the peace towards the people of this State, and particularly towards the person against whom, or whose property, there is reason to fear the offense may be committed.

SEC. 4120. If the undertaking required by the last section be given, the party complained of must be discharged. If he do not give it, the magistrate must commit him to prison, specifying in the warrant the requirements to give security, the amount thereof, and the omission to give the same.

SEC. 4121. If the person complained of be committed for not giving an undertaking, he may be discharged by a magistrate upon giving the same.

SEC. 4122. The undertaking, together with the complaint, affidavits, if any, and other papers in the proceeding, must be returned by the magistrate to the district court of the county by the first day of the next term thereof.

SEC. 4123. Any person who, in the presence of a court or magistrate, shall assault or threaten to assault another, or to commit an offense against the person or property of another, or contends with another with angry words, may be ordered, without the process, to enter into an undertaking to keep the peace for a period of time not exceeding beyond the next term of the district court of the county as hereinbefore pro-

vided, and in case of his omission to comply with said order, he may be committed accordingly.

IN DISTRICT COURT.

SEC. 4124. The district court may, on the conviction of any person for an offense against the person or property of another, when necessary for the public good, require the defendant to enter into an undertaking to keep the peace as hereinbefore provided, and on his omission to do so, may commit him accordingly.

SEC. 4125. A person who has entered into an undertaking to keep the peace, when required by a magistrate as hereinbefore provided, must appear on the first day of the next term of the district court of the county, and if the complainant appear and the person bound by the undertaking does not appear, the court may forfeit his undertaking, and order the same to be prosecuted unless his default be excused.

SEC. 4126. If the principal in the undertaking appear, and the complainant does not appear, or if neither of the parties appear, the court shall enter an order discharging the undertaking; but if both parties appear, the court shall hear their proofs, and may require a new undertaking in such sum as it shall prescribe for a period not exceeding one year; and may commit the defendant until the same be given. Judgment shall be entered against the party held to keep the peace for all the costs of the proceeding; but if it is made to appear to the court that the proceeding was instituted without probable cause, the court may render judgment against the complainant for such costs.

SEC. 4127. An undertaking to keep the peace is broken by the forfeiture of the same, by the court, as hereinbefore provided, or upon the conviction of the party bound by the undertaking of a breach of the peace.

SEC. 4128. Upon the district attorney producing evidence of such conviction to the district court to which the undertaking is returned, the court must order the undertaking to be prosecuted, and the district attorney must, thereafter, commence an action upon it.

SEC. 4129. In the action, the offense stated in the record of conviction must be alleged as the breach of the undertaking, and is conclusive evidence thereof.

Form of Information.

THE STATE OF IOWA, } In Justices Court, before . . . , a Justice of . . county.
vs. }
. } Information.

The defendant is accused of the crime of threatening the commission of a public offense: For that the defendant in the township of county, Iowa, on

the . . . day of . . . , 1878, did willfully and unlawfully threaten to commit a public offense by then and there threatening to take the life of A B, and this affiant does and has reason to believe that the said defendant will carry his threat into execution, if not prevented from so doing, contrary to, and in violation of, law.

EVIDENCE—DEFENDANT NOT A COMPETENT WITNESS.

Under section 4115 above and section 4556 of the Civil Code, chapter 37, title "Evidence," which last provides that "the rules of evidence prescribed in the civil part of this Code, shall apply to criminal proceedings as far as applicable, and as they are not inconsistent with the provisions of this chapter; but nothing contained in this title shall render any person who, in any criminal proceeding, is charged with the commission of any public offense, competent or compellable to give evidence thereon for or against himself." A party charged with a public offense is not a competent witness in his own behalf. *State v. Laffer*, 38 Iowa, 422. But now, under the law of 1878 (see title Evidence), a prisoner may testify in his own behalf. And the threatening the commission of an offense is a criminal charge within the meaning of the law. *State v. Bates*, 23 Iowa, 97. This point was fully decided in *State v. Darrington*, December Term, 1877 (*Western Jurist*, March number, 1878, page 185), holding that the defendant cannot be a witness in his own behalf.

TESTIMONY IN WRITING.

The failure of a justice of the peace, where a party is charged with threatening to commit an offense against a person or property of another, to reduce the evidence to writing, and cause the same to be subscribed by the witnesses as required by section 2781, Code of 1851, which is the same as section 4117, Code of 1873, furnishes no good reason for dismissing the proceedings, on motion in the district court. The jurisdiction of the district court, in such cases, is in no sense in the nature of an appeal from the judgment or decision of the justice. *State of Iowa v. Gribble*, 3 Iowa, 217.

DISTRICT COURT IS NOT CONFINED TO EVIDENCE TAKEN BEFORE JUSTICE.

On hearing, the district court is not confined to the testimony written down by the justice, but may hear oral evidence, and the court is not restricted to the testimony given before the inferior court. *Ib.*

COSTS—TO WHOM TAXED.

Where the prosecuting witness fails to appear in the district court, the undertaking is discharged at the defendant's cost, as the costs before the justice are always properly chargeable to the defendant, unless there is a hearing in the district court and a finding in the defendant's favor; in that case he is not liable for costs in that court. *State v. Gribble*, 3 Iowa, 217; *State v. Leathers*, 16 Iowa, 406.

COSTS TAXED TO UNSUCCESSFUL PARTY.

Where a re-examination is had in the district court at the instance of the prosecuting witness, with a view of continuing the defendant under bonds, and the complaint fails, or is found groundless, the costs made in the district court, in that event, will be taxed to the unsuccessful party. *State v. Leathers*, 16 Iowa, 406.

FAILURE OF PROSECUTING WITNESS TO APPEAR.

The failure of the prosecuting witness to appear at the district court and further prosecute the defendant who has, upon his information, been placed under bond to keep the peace, does not warrant a judgment against such prosecutor for costs that have been incurred. *State v. Holliday*, 22 Iowa, 397.

DISCHARGE IN DISTRICT COURT.

Where the defendant was bound over upon recognizance in the justice's court to keep the peace, and he appeared in the district court at its next term, but the complainant not appearing, and there being no trial of the cause in order to determine whether the defendant should be required to enter into a new recognizance or not, but it was directed to discharge the defendant's recognizance, *held*, under the Code, section 4126, the court did not err in refusing a trial as demanded by the defendant. The only object of such trial is to determine whether the recognizance should be continued or a new one required.

RULE AS TO COSTS.

Where the defendant demanded a hearing and trial of the case, which could not be had in the absence of the complain-

it, the court did not err in rendering judgment for costs without determining the question involving the existence of probable cause for the proceeding. The judgment dismissing the case is to be regarded as an order discharging the recognizance of defendant, and so far as it is for costs, it is authorized by the provisions of the Code cited. *State v. White*, 5 Iowa, 325.

CONDITIONAL THREATS.

A threat coupled with a condition which includes the performance of a professional duty is one in violation of law, but a threat coupled with a condition which contemplates the doing of an unlawful or unnecessary act by the party threatened, furnishes no ground for complaint. *Richey v. Davis*, 11 Iowa, 123.

APPEAL FROM JUDGMENT OF COSTS.

A judgment of costs against a prosecuting witness makes him a party to the record, and entitles him to the right of exceptions and appeal. *State v. Holliday*, 22 Iowa, 397.

THROWING DEAD ANIMALS INTO STREAMS, WELLS, ETC.

SECTION 4041. If any person throw, or cause to be thrown, any dead animal into any river, well, spring, cistern, reservoir, stream, or pond, he shall be punished by imprisonment in the county jail not less than ten nor more than thirty days, or by fine not less than five nor more than one hundred dollars. [Limitation, by section 4168, one year.]

Form of Information.

THE STATE OF IOWA } Before . . . , a justice of . . . county, Iowa.
VS. }
. } Information.

The defendant is accused of the crime of throwing a dead animal into a well, for which the defendant on or about the . . . day of . . . , 187.., in the township of . . . , county of . . . , and State of Iowa, did unlawfully throw a dead animal, to-wit: a dead hog, into a certain well there situated, in . . . township, . . . county, and State aforesaid, the said well being the property of one W M, which well was then and there being used by the said W M, for domestic purposes, which the said defendant well knew at the time.

Or, did then and there unlawfully in the township of Marion, county and State aforesaid, throw a dead animal, to-wit: a dead horse, into a certain stream, to-wit: Indian Creek, contrary to, and in violation of, law.

TRANSACTIONING BUSINESS WITHOUT A LICENSE.

SECTION 4046. If any person carry on or transact any business or occupation without license therefor when such license is required by any law of this state, he shall be fined in a sum not exceeding one hundred dollars, or imprisoned in in the county jail not exceeding thirty days.

Sections 906 and 907 provide that a tax for state purposes be levied upon peddlers of merchandise, not manufactured in this State, for license to peddle throughout the State, and that such licenses must be obtained from the county auditor; and upon a conviction of so peddling without a license, the offender shall forfeit and pay to the county treasurer, in addition to the fine imposed upon him for the misdemeanor, double the amount of license for one year, as fixed by said section 906; and as amended by chapter sixty-two, laws of 1874, with the proviso that it does not apply to wholesale dealers in any of the above enumerated articles, who use wagons for the delivery of goods sold at wholesale prices and by the box or package.

LAWS OF 1876, CHAPTER 131.

(1.) Before any person can exhibit any traveling show or circus not prohibited by law, or show any natural or artificial curiosity, or exhibition of horsemanship in a circus or otherwise, for any price, gain or reward, in any county outside of the limits of any city or incorporated town, he shall obtain a license therefor from the county auditor upon the payment to the county treasurer, of such sum as may be fixed by the board of supervisors, not exceeding one hundred dollars for each and every place in the county at which such show or circus may exhibit.

[2.] If any person shall exhibit any show above contemplated, without having first obtained such license, he shall be deemed guilty of a misdemeanor and punished accordingly, and shall forfeit and pay double the amount fixed for such license, for the use and benefit of the school fund.

The violation of this section is an indictable offense.

LAWS OF 1874, PAGE 58.

SECTION 1. That section 906, of chapter 2, of title 6, of the Code, be amended by adding to said section the following proviso: *Provided*, however, that nothing in this section shall apply to wholesale dealers in any of the above enumerated ar-

who use wagons for the delivery of goods sold at wholesale prices and by the box or package. [Limitation, by sec. 168, one year.]

Form of Information.

STATE OF IOWA, } Before . . . , a justice of . . . county, Iowa.
 VS. }
 } *Information.*

Defendant is accused of the crime of peddling without a license, for that the said defendant on the . . . day of . . . , 187 . . , in the county of . . . , and State of Iowa, was found peddling, selling, and having for sale in said township, certain wares and merchandise, the same not being manufactured within this State, said A B, not being a wholesale dealer therein, and not having obtained a county auditor a license so to sell, contrary to, and in violation of, law.

statute which makes it a penal offense to travel from place to place for the purpose of "carrying to sell, or exposing for sale, any goods, wares, and merchandise," without a license broker and peddler, is held to be valid, and that the act of exercising the police power of the State and, therefore, repugnant to the requirement of the Constitution, that the rule of taxation should be uniform," and such act is not a violation of the Federal Constitution. Laws prohibiting the sale of liquor or the keeping of dogs without license, are familiar illustrations of the exercise of police power. Such laws have been upheld by this court upon the express ground that they were not an exercise of the taxing, but of the police power. *Carter v. Dow*, 16 Wis., 298; *Tenny v. Lenze*, 16 Wis., 66; *State v. Ludington*, 33 Wis., 107. Of the same character is a law requiring certain insurance agents to pay a certain percentage of the premium received by them to the fire department. *Fire Department v. Helfenstein*, 16 Wis., 136. In *Tenny v. Lenze*, it was expressly held that the fact that the license fees produced revenue, did not change the character of the law; it was still an exercise of the police power.

It was said in *State v. Ludington*, by Chief Justice DIXON, "that the legislature has power to prohibit the carrying on of the business of hawkers and peddlers, we do not doubt." So it was said by Chief Justice SHAW, in *Commonwealth v. Alger*, 10 Mass., 84. "Rights of property, like all other social and constitutional rights are subject to such reasonable limitations as their enjoyment as shall prevent them from being injurious, to such reasonable restraint and regulations established by

law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient." *Morrill v. State*, 38 Wis., 428; 20 Am. R., 12.

USING BOX OR CASK MARKED BY ANOTHER.

SECTION 4080. If any person with intent to defraud, use any cask, package, box or bale, marked, branded or stamped by another, for the sale of merchandise or produce of an inferior quality, or less in quantity or weight than is denoted by such mark, stamp or brand, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding two hundred dollars, or by both fine and imprisonment at the discretion of the court. [Limitation, by section 4167, three years.]

SEC. 4081. Every person who is convicted of any gross fraud or cheat at common law, shall be punished as provided in the preceding section 4080.

Swindling by Three Card Monte, etc., see title "Swindling."

UNLAWFUL ASSEMBLIES RIOTS AND DISTURBANCES.

SECTION 4066. When three or more persons in a violent or tumultuous manner assemble together to do an unlawful act, or, when together, attempt to do an act, whether lawful or unlawful, in an unlawful, violent or tumultuous manner to the disturbance of others, they are guilty of an unlawful assembly, and every such offender shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.

SEC. 4067. When three or more persons together and in a violent or tumultuous manner commit an unlawful act, or together do a lawful act in an unlawful, violent or tumultuous manner to the disturbance of others, they are guilty of a riot, and every such offender shall be punished as is provided in the preceding section.

SEC. 4068. Any person guilty of unlawfully assembling, or of a riot, may alone be indicted and convicted thereof, but it must be alleged in the indictment and proved on the trial that three or more persons were engaged therein.

SEC. 4069. If any person make or excite any disturbance in any tavern, store or grocery, or at any election, or public meeting, or in any other place where the citizens are peaceably and lawfully assembled, he shall be punished by fine not

g one hundred dollars, or by imprisonment in the
ail not exceeding thirty days.

070. If any person or persons unlawfully or riotously
and, pull down, injure or destroy, or begin to pull
down, or attempt to injure or destroy any dwelling house or other building,
or attempt to injure or destroy any boat or vessel;
or attempt to commit any premeditated injury on the person of
any person, such injury not being a felony, he shall be punished by impris-
onment in the penitentiary not more than five years, or by
fine not exceeding five hundred dollars and imprisonment in
the county jail not more than one year, and shall also be
liable to any person injured to the full amount of the
damages sustained in an action at law.

4071. Any person who shall be guilty of racing or driving upon the public highway in a manner likely to endanger the persons or lives of others, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined in a sum not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

Form of Indictment.

E OF IOWA } In District Court of . . . county, . . . term, 1878.
S. }

Indictment.

d jury of the county of . . . , in the name and by the authority of the State
 case . . . of the crime of a riot, committed as follows: That the said . . .
 . . . day of . . . , 187 . . . in the county of . . . , and State of Iowa, did, un-
 lawfully, violently, and in a tumultuous manner, assemble together and in a
 tumultuous manner make a great noise and tumult, and throw stones
 into the windows and against the doors of a certain dwelling house, then
 occupied by one J S, in said county and State, which acts were to the
 of the said J S, and citizens generally, and contrary to, and in violation

r section 4070: did unlawfully, riotously and in a tumultuous manner as-
 ather, and being so unlawfully assembled together, did unlawfully and
 destroy a certain boat known and called "The Double Six," by breaking
 shing the pilot house of said boat, and tearing off the boards and tim-
 boat, contrary to, and in violation of law, the said boat being owned by
 I W. L.

nder section 4066, the form of the information may
lows: [Limitation, by section 4168, one year.]

OWA) Before . . . , a justice of . . . township, . . . county, Iowa.

Information.

ndants are accused of the crime of an unlawful assembly, for that the on the . . . day of . . . 187 . , in the township of Marion, Linn county, unlawfully, violently, and in a tumultuous manner assemble together to d there, an unlawful act, to the disturbance of others, by then and there and tumultuous manner disturbing, annoying, and breaking up a certain ety, then and there assembled, within a certain school house known and oln school house, there situated, by then and there making loud and un- s, using indecent and offensive language contrary to, and in violation of,

Under section 4069, exciting a disturbance (same limitation as last above), use the same formal part, except that this crime may be committed by *one* or more.

The defendant is accused of the crime of exciting a disturbance, for that the defendant on . . . , and at . . . , willfully, unlawfully, and violently did excite a disturbance in a certain public meeting, then and there being held in the court house in said township and county, where the citizens had peaceably and lawfully assembled, by then and there threatening to fight, contrary to, and in violation of, law.

Under section 4071, Racing or Fast Driving (Limitation one year):

. . . did willfully and unlawfully race horses, by then and there driving a horse at an unusual rate of speed on, over, and through a certain street, known and called Main street, in said town of Marion, and then and there being in a manner likely to endanger the lives of persons, and citizens of said town.

INDICTMENT—SUFFICIENCY OF—RIOT.

An indictment charging that three persons riotously and unlawfully gathered and assembled together, and then and there did, etc., make a great noise, tumult and disturbance, to the terror of citizens, etc., describes a riot. *State v. Voshall*, 4 Ind., 589; 5 Blackf., 365.

And an indictment for a riot in disturbing the officers of an election, which charges "that the said Runnells, with five others named therein, together with a great number of other persons, to the number of fifty or more, to the jurors aforesaid as yet unknown, on the 6th day of . . . , being the first Monday of the same month, with force and arms, etc., unlawfully, riotously and routously did assemble and gather together, to disturb the peace of the commonwealth aforesaid; and being so assembled and gathered together unlawfully, riotously and routously, with shouts and huzzas, did then and there rush into the public town house, or court house, wherein the citizens, being legal voters of said town, were then and there constitutionally and legally assembled in town meeting for the purpose of giving their votes, etc.," was held to charge a criminal offense, and that it was not necessary to allege that it was to the great terror of the people. *Commonwealth v. Runnells et al.*, 10 Mass., 518.

DISTURBING A CONGREGATION—DUPPLICITY.

And an indictment charging "with force and arms, did ^{be} have indecently and rudely, and then and there did willfu ^{ll} interrupt and disturb the people of said . . . , then and the ^o

assembled in said meeting house for public worship," charges two offenses and cannot be joined in one count. *Com. v. Symonds*, 2 Mass., 163.

ALLEGATION—FELONIOUSLY.

An indictment for a riot need not contain the word "felonious." *Queen v. Casey, et al.*, 2 Green's Crim. R., 66.

ELEMENTS.

A riot cannot be committed by one person alone, and hence one person cannot be guilty of a riot, although he should do the very acts, which if done in connection with other persons, would make him guilty. *State v. Conlee*, 25 Iowa, 240. And if the act is indivisible, such as conspiracy or riots, then one cannot be convicted without the other. *Stephens v. State*, 14 Ohio, 388; *Klein v. People*, 31 N. Y., 235. But, by section 4068, Iowa Code, herein set out, any person guilty of an unlawful assembly or of a riot, "may alone be indicted and convicted thereof, but it must be alleged in the indictment and proved on the trial that three or more persons were engaged therein."

An unlawful assembly, riotously and tumultuously disturbing the selectmen of the town, in the exercise of their duty, on a public day, and in a public place, and obstructing the inhabitants, at an election, is a riot, and an aggravated one. *Com. v. Runnells*, 10 Mass., 520. To convict one of a riot, it must be shown that the defendant took an active part in such riot, either by doing some riotous act, or by aiding and abetting others therein; his mere presence on the scene of riot is not enough. *Scott's case*, 2 C. H. N. Y. Rec., 25. It requires no previous design or preconcert, in order to constitute a riot. Concert of action is enough. *People v. Ferris*, 4 Hall, L. J., N. Y., 209. So, if a crowd of three or more persons make an attack upon another, with a preconcerted intent to commit an assault and battery upon him, and accomplish the unlawful act, and the defendants, or any of them, participated in the unlawful proceeding, they are guilty of a riot. *People v. White*, 55 Barb., 606.

UNLAWFUL ASSEMBLIES.

The collection of a crowd in a public street to listen to a

temperance lecture, is an unlawful assembly, and the lecturer may be arrested by an officer without warrant. *Falconer v. Steers*, 3 Luz. L. Obs., N. Y., 163. The assemblage of the municipal police, though an illegal organization, by order of the mayor, to resist a forcible expulsion of the street commissioner from his office, is not an unlawful assembly. *Slater v. Wood*, 9 Bos., N. Y., 15.

Under the statute of Indiana, three persons must be guilty to constitute a riot, but one may be tried and convicted separately. *Turpin v. State*, 4 Blackf., 72. If they do an unlawful act of violence, it is a riot. 6 Blackf., 37. Or, a lawful act violently. 4 Ind., 114.

CHARIVARI.

A charivari may be a riot, and the custom of practicing them will not relieve such as may fall within the definition of a riot from that character. *Bankus v. State*, 4 Ind., 114.

HORSE RACING ON HIGHWAYS.

It is not necessary in an indictment for horse racing to state the termini of the highway. *State v. Burgett*, 1 Ind., 479. But the indictment should be reasonably certain. *Myres v. State*, 1 Ind., 251. Nor is it necessary to allege that it should be proven that there was a bet upon, or judges of, the race, or that the highway has been regularly laid out, if it be shown to be used as a public highway, where the race was run. *Watson v. State*, 3 Ind., 123. In Iowa, horse racing is not a game of chance. *Harless v. U. S.*, Morris, 169.

DISTURBING A RELIGIOUS MEETING.

An indictment for disturbing a religious meeting, may charge the defendant, in the same count, with disturbing the society and its members, and need not state the name of the society. *State v. Ringer*, 6 Blackf., 109. But the disturbing of a religious congregation by singing, when the singer does not intend so to disturb it, but is conscientiously taking part in the religious services, may be a proper subject for the discipline of his church, but is not indictable. *State v. Linkhaw*, 69 N. C., 214, 1873; 1 Green Cr. R., 288.

DISTURBING A SCHOOL MEETING.

On the trial of a person charged with the willful disturb-

ance of a public school, it is competent for the defendant to prove that he was a member of the district school board, and that what he did was in pursuance of an order of the board of directors and in the honest discharge of his official duties, and it is error to exclude such testimony. *Bays v. State*, 6 Neb., 167.

USING FALSE WEIGHTS AND MEASURES.

SECTION 4076. If any person with intent to defraud, use a false balance, weight, or measure, in the weighing or measuring of anything whatever that is purchased, sold, bartered, shipped, or delivered for sale or barter, or that is pledged or given in payment, he shall be punished by fine not exceeding five hundred dollars nor less than fifty dollars, or by imprisonment in the county jail not more than six months, or by both fine and imprisonment at the discretion of the court.

SEC. 4077. The magistrate granting the warrant of arrest for this offense must also direct the seizure of the false weights, balances or measures; and if the party be convicted, or they are found to be false, they shall be forfeited to the county, and, after being made of the standard weight or measure, may be sold and the money arising from such sale must be paid into the county treasury. [Limitation, by section 4167, three years.]

Form of Indictment.

THE STATE OF IOWA } District Court of the county of term, 1. 78.
vs. }

Indictment.

The grand jury of the county of in the name and by the authority of the State of Iowa, accuse of the crime of using false weights, committed as follows: The said on or about the day of 187 . . . , in the county of . . . , State of Iowa, and from thence to the finding of this indictment, was a grocer, engaged in buying and selling divers goods, wares, and merchandise, and did unlawfully, deceitfully, and fraudulently keep in his store false weights for weighing goods, wares and merchandise, by him sold, which caused them to appear of greater weight, to-wit: of the greater weight by one ounce in every pound of goods weighed than the real and true weight thereof, and during that time did, then and there knowingly sell to divers citizens of this State, divers wares, goods and merchandise weighed with such false weights, contrary to, and in violation of, law.

VAGRANCY.

SECTION 4130. The following persons are vagrants: All persons who tell fortunes, or where lost or stolen goods may be found; all common prostitutes and keepers of bawdy houses or houses for the resort of prostitutes; all habitual drunkards, gamesters or other disorderly persons; all persons wandering about and having no visible calling or business to maintain themselves; all persons begging in public places, or

from house to house, or procuring children so to do; all persons going about as collectors of alms for charitable institutions under any false or fraudulent pretenses; all persons playing or betting in any street or public or open place at, or with any table or instrument of gaming at any game or pretended game of chance.

SEC. 4131. Upon complaint made on oath to any magistrate against any person as being such vagrant within his local jurisdiction as defined in this Code, he shall issue a warrant for the arrest of such person, and his examination, and the complaint, warrant and arrest shall be governed by the provisions of the last chapter, as nearly as practicable, except as hereinafter provided.

SEC. 4132. All peace officers shall arrest any vagrant whom they may find at large and not in the care of some discreet person, and take him before some magistrate of the county, city or town in which the arrest is made.

SEC. 4133. If the arrests authorized in the last two sections are made during the night, the officer must keep the person arrested in confinement until the next morning, and if arrests are made within the local jurisdiction of a police or city court, the persons arrested must be taken before a judge or justice of such court, unless he be absent.

SEC. 4134. If it appear by the confession of such person, or by competent testimony, that such person is a vagrant, the magistrate before whom he is brought may require of such person an undertaking, with sufficient surety, for good behavior for the term of one year thereafter.

SEC. 4135. The magistrate shall make up, sign and file with the clerk of the District Court of the county, a record of conviction of such person as a vagrant, specifying, generally, the nature and circumstances of the charge, and shall, in default of such security being given, by warrant under his hand, commit such vagrant to the county jail of the county, city or town, as the case may be, until such security be found, or such vagrant discharged according to law.

SEC. 4136. The committing of any of the acts which constitute such person so bound a vagrant, shall be deemed a breach of the condition of such undertaking.

SEC. 4137. On a recovery upon any such undertaking, the court before which such recovery may be had, may, in its discretion, either require new sureties for good behavior, or may commit such vagrant to the common jail of the county for any time not exceeding six months.

SEC. 4138. Any person committed to jail for not finding sureties for good behavior, may be discharged by any magistrate upon giving such sureties for good behavior as were originally required of such person.

TRIAL IN DISTRICT COURT.

SEC. 4139. The District Court to which the papers are returned, shall, on demand of the defendant, empanel a jury to inquire into and determine the truth of the charge made against him; and the rules and regulations of law governing said court in the trials of misdemeanors shall be applicable to and govern it in the trial herein contemplated.

SEC. 4140. If no jury be demanded the District Court may revise such conviction and discharge such vagrant from the undertaking or confinement absolutely, or upon sureties for good behavior, in its discretion.

SEC. 4141. Such District Court may, in its discretion, order any such vagrant to be kept in the common jail for any time not exceeding six months, at hard labor.

SEC. 4142. If there be no means in such jail for employing offenders at hard labor, such court may direct the keeper thereof to furnish such employment as it shall specify to such vagrant as may be committed thereto either by a justice or any court, and for that purpose to purchase any necessary raw materials and implements, not exceeding such amount as the court shall prescribe, and to compel such persons to perform such work as shall be allotted to them.

SEC. 4143. The expenses incurred in pursuance of such order shall be audited by the board of supervisors of the county, and paid out of the county treasury.

SEC. 4144. One half of the net proceeds of such labor shall be paid to the person earning the same, upon his discharge from imprisonment, and the other half shall be paid into the county treasury for the use of the county.

ACT 16TH GENERAL ASSEMBLY, CHAPTER 69.

SECTION 1. That if any male person, physically able to perform manual labor, shall be found in a state of vagrancy, or practicing common begging, he shall, on conviction thereof be fined in any sum not exceeding fifty dollars, and sentenced to hard labor in the jail of the county, for which labor he shall receive a credit at the rate of seventy-five cents per day, until said fine and costs of prosecution, and accruing costs, shall be paid.

ACT 16TH GENERAL ASSEMBLY, CHAPTER 61.

SEC. 2. The board of supervisors of the several counties are hereby authorized to provide for carrying the provisions of the foregoing section into effect, for which purpose they may, by order entered upon their journals, declare that the

jail shall extend to and include the lands of the proper county, and every form and kind of labor commonly performed therein by male persons.

Form of Information.

THE STATE OF IOWA, } Before . . . , an examining magistrate of . . . town-
VS. } ship, Linn county, Iowa.
. } *Information on charge of vagrancy.*

The defendant is accused of the crime of vagrancy: For that the defendant, the said C D, on or about the . . day of . . , 187 , in the town of M, township of . . county, Iowa, was found in a state of vagrancy, in that he was and is wandering about in said town and county, having no visible calling or business by which to support or maintain himself (or such other cause as is set out which makes the party a vagrant), contrary to, and in violation of, the provisions in such cases made and provided. A. B.

STATE OF IOWA, } ss.
LINN COUNTY. }

I, A B, being sworn, upon oath do say that the matters and things in the above information set out are true as I verily believe. A. B.

Subscribed and sworn to before me this . . . day of . . , 187 . _____, J. P.

Upon an information being filed before a justice, he will then issue the usual warrant, as in criminal cases.

This proceeding under the vagrant act is merely a preliminary examination, and the justice before whom the complaint is filed acts simply as an examining magistrate, and as such has no power to try the case nor to punish the party charged. He can only examine the defendant and require him to give security for his appearance before the district court, and in default of such security, commit him to jail. The accused in such proceedings is not entitled to the right of a jury trial before a justice. The evidence taken before such magistrate should be reduced to writing and returned to the clerk of the district court with all the papers in the case. The defendant, on his or her being brought before the magistrate, is entitled to a reasonable time to procure witnesses and counsel, if he or she so desire. Chapter 4, of the Code of 1873, of security to keep the peace, applies to this proceeding, except where necessarily incompatible. On hearing the evidence, if the magistrate is satisfied that the accused is guilty, or *has reason to believe* that he is guilty of the charge set out in the complaint, he shall require the accused to enter into bonds for his good behavior and for his appearance at the next term of the district court of said county. The bond may be in the following form:

We, the undersigned, C D as principal, and J H as surety, acknowledge ourselves indebted unto the State of Iowa in the penal sum of . . . dollars, to be paid upon condition as follows:

Whereas, said C D was arrested and brought before A H, an examining magistrate of Linn county, Iowa, on a charge of vagrancy, and was, on the . . . day of . . . , 187 . . . , by said magistrate held to appear and answer before the district court of said county at its next term thereof in the sum of . . . dollars. Now if the said C D shall appear at the next term of the district court of said county, and abide the orders of said court, and in the meantime conduct himself properly towards all the people of the State of Iowa, then this obligation to be void, otherwise in full force.

The above bond is this day accepted and approved by me.

Dated . . . , 187 . . .

_____, J. P.

If the defendant does not give the undertaking, when required by the magistrate, he should be committed to jail by a warrant of commitment in the usual form, and as usually given in preliminary examinations, specifying in the warrant the amount of bail required, and the defendant's failure to furnish the same. The record of conviction under section 4131 may be substantially as follows:

STATE OF IOWA, | ss.
LINN COUNTY, | ss.

THE STATE OF IOWA, }
vs. } *Warrant of Commitment.*
..... }

Be it remembered that C D, the above named defendant, was this day brought before me, the undersigned, a justice of the peace in and for said county, at my office in . . . township, in said county, upon the charge and accusation that the said C D was and is a vagrant, in that he was and therefore had been, wandering about, and having no visible calling or business to maintain himself. And I, the said justice, being satisfied upon due and personal examination of said C D, and by competent testimony before me given that such charge and accusation are in all respects true; I do therefore hereby order and adjudge that said defendant be held to answer said offense; and that he give an undertaking as required by statute, in the sum of . . . dollars, for his appearance at the next term of the district court of said county to answer said offense and for his good behavior in the meantime, and that on failure to give such undertaking, he be committed to the common jail of the county until he shall give the same, or be sooner discharged by law. And now, the said defendant having given such undertaking, he is therefore discharged from custody.

Witness my hand this . . . day of . . . , 1878.

_____, J. P.

In the matter of *ex parte* Maggie Hammond, before Dillon, J., at chambers, 1865, the judge held, that the inferior magistrate before whom the complaint is made against a vagrant has no power to try the case or punish the vagrant. He can only examine him and require security, and in default of such security commit him to jail, so that the accused cannot claim a trial by jury before the magistrate. But when the record of the proceedings before the magistrate is returned to the district court, the accused is entitled to a trial by jury.

JUSTICE'S JURISDICTION.

As sections 1 and 2, chapter 69, laws of 1876, do not appear to amend or repeal the provisions of the Code of 1873, and as repeals by implication are not favored, these two sections must apply to proceedings in the district court only, and do not confer upon any magistrate the right to try and determine such cases.

VIOLATION OF SUNDAY.

SECTION 4072. If any person be found on the first day of the week, commonly called Sabbath, engaged in any riot, fighting, or offering to fight, or hunting, shooting, carrying fire-arms, fishing, horse racing, dancing, or in any manner disturbing any worshipping assembly, or private family; or in buying or selling property of any kind, or in any labor, the work of necessity and charity only excepted, every person so offending shall, on conviction, be fined in a sum not more than five dollars nor less than one dollar, to be recovered before any justice of the peace in the county where such offense is committed, and shall be committed to the jail of said county until said fine, together with the costs of prosecution, shall be paid; but nothing herein contained shall be construed to extend to those who conscientiously observe the seventh day of the week as the Sabbath, or to prevent persons traveling, or families emigrating from pursuing their journey, or keepers of toll bridges, toll gates, and ferrymen from attending the same.

(191) No court can be opened, nor any judicial business transacted on Sunday, except—

1. To give instructions to a jury then deliberating on their verdict;

2. To receive a verdict, or discharge a jury;

3. To exercise the powers of a single magistrate in a criminal proceeding;

4. And such other acts as are provided by law. Also, to do such acts as are provided in sections 2607, 2952, 3028, 3227, and 3434 of the Civil Code.

The form of an information for violating the Sunday law may be as follows:

Form of Information.

STATE OF IOWA, } Before . . . , a justice of . . . township, . . . county, Iowa.
vs.
A . . . B . . . } *Information.*

The defendant is accused of the crime of violating the Sabbath: For that the defendant, in the township of Marion, Linn county, Iowa, on the . . day of . . . ,

187 . , it being the first day of the week, commonly called Sabbath, was found engaged in [here insert what the violation was], and that defendant does not conscientiously keep any other day as Sunday, and that the same was not of necessity nor charity, contrary to, and in violation of, law. L. M——.

STATE OF IOWA, }
LINN COUNTY. } ss.

I, L. M., being duly sworn, upon oath, state that the matters and things in the above information set forth are true, as I verily believe.

L. M——.

Subscribed and sworn to, etc.

ACTS VOID ON SUNDAY.

All acts are void on Sunday unless specially provided for by statute. *Davis v. Fish*, 1 G. Gr., 410, and authorities there cited.

STATUTE IMPOSING PENALTY OF PARTICULAR ACTS, IMPLY PROHIBITION.

When a statute imposes a penalty for the commission of a particular act, it implies a prohibition. *Murphy v. Simpson*, 14 B. Mon., 419; *Sites et al. v. Sheets*, 7 Ind., 132; *Pennington v. Townsend*, 7 Wend., 276; *Robeson v. French*, 12 Metcalf, 25; *Lyon v. Strong*, 6 Ver., 219; *Gregg v. Wyman*, 4 Cush., 322; *Davis v. Brunson*, 6 Iowa, 410; *Wheeler v. Russell*, 17 Mass., 258; *Pike v. King*, 16 Iowa, 49.

Generally, in informations of this character, the exception should be set out in the information. For instance, to say "that said labor was not of necessity nor charity," or to say "that the said defendant does not conscientiously observe any other day for the Sabbath." On this subject see "Indictments," title, "Exceptions and Provisos."

INFORMATION—EXCEPTIONS.

Where a statute defining an offense contains an exception in the enacting clause, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be fully set out without negating the exception, an indictment or information must allege enough to show that the accused is not within the exception; but if the exception is separable from the language of the enacting clause, and the offense can be fully and accurately defined without reference to it, the indictment is good without such reference. *Rex v. Mason*, 2 Term R., 581; *Commonwealth v. Hart*, 11 Cush., 132; *State v. Abbey*, 29 Vt., 66; 1 Bishop's Crim. Prac. 2d

ed., section 639. But if it is not so incorporated with the clause defining the offense, as to become a material part of the definition of the offense, then it is a matter of defense, and must be shown by the other party, though it be in the same section, or even in the succeeding sentence. 2 Lead. Crim. Cases, 2d ed., 12; *Vavasour v. Armrod*, 9 D. and R., 599; *Spiers v. Parker*, 1 Term R., 141; *Commonwealth v. Bean*, 14 Gray, 53; *Steel v. Smith*, 1 B. & Ald., 99; *Gurly v. Gurly*, 8 Cl. & Fin., 764; *Minnis v. United States*, 15 Peters, 445; Stephen on Pleading, 9th Am. ed., 443; *Jones v. Azen*, 1 Lead Raym., 120. Also, *State v. Hobbs*, 39 Maine, 212; *People v. Santorood*, 9 Cow., 660; *State v. Rust*, 8 Blackf., 195; *State v. Bryan*, 19 La., 435; *U. S. v. Watkins*, 3 Cranch, C. C., 550; *People v. Miller*, 12 Cal., 294; *McClane v. State*, 4 Geo., 340.

ALLEGATION OF DATES—ON OR ABOUT.

An information or an indictment for a violation of the Sunday law, which alleges the sale to have been *on or about* a certain day, the said day being on Sunday, is bad, and no conviction can be had, time being of the essence of the offense. *Effinger v. State*, 47 Ind., 235; 1 Am. Cr. R., 486.

EXCEPTIONS.

Labor and traveling on the Lord's day, except from necessity and charity, are forbidden in some states by statute, which exception is a constituent part of the offense, as it is not labor and traveling, merely, which are prohibited, but *unnecessary* labor and traveling. *State v. Barker*, 18 Vt., 195. To the same effect, *Com. v. Tuck*, 20 Pick., 361.

ACTS OR LABOR NOT CONSTITUTING A VIOLATION.

Running gas factories, dairies, water works, and like business, cannot be included with the labor prohibited. *Bloom v. Richards*, 2 Ohio St., 387; *McGatrick v. Wasson*, 4 Ohio St., 569.

MUNICIPAL CORPORATION—RESTRICTION.

An ordinance prohibiting opening of shops, etc., for the purpose of business, without excepting cases of necessity and charity, and without exempting from its operation persons who conscientiously observe the seventh day of the week as

the Sabbath, is inconsistent and void. *City of Canton v. Nist*, 9 Ohio St., 439.

TRIAL BEFORE JUSTICE ON SUNDAY.

A trial of a case of bastardy on Sunday by a justice of the peace is void, unless authorized by statute. *Chapman v. State*, 5 Blackf., 111; *King v. Strain*, 6 Ind., 447. The performing of any act of usual avocation on Sunday is illegal. *Voglesong v. State*, 9 Ind., 112.

ARREST—ORDINANCE.

An arrest cannot be made on Sunday for the violation of a municipal ordinance. *Wood v. Brooklyn*, 14 Barb., 425.

JUSTICES OF THE PEACE—RECEIVING VERDICT.

A justice may receive the verdict of a jury on Sunday, but he cannot enter judgment on that day. *Houghtaling v. Osborn*, 15 Johns, 119; *Allen v. Godfrey*, 44 N. Y., 433; *Pulling v. People*, 8 Barb., 384.

VIOLATING REGULATIONS OF THE BOARD OF HEALTH.

SECTION 419. Any person who shall willfully violate any of the regulations so made and published by the trustees, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine or imprisonment, such fine not to exceed one hundred dollars, and such imprisonment not to exceed thirty days.

CRIMINAL PLEADING AND PRACTICE.

ADJOURNMENTS AND SPECIAL TERMS OF COURT.

Judges have power to appoint special terms of court. *Davis Fish*, 1 G. Greene, 406; *Harriman v. State*, 2 G. Greene, 2. These two cases are doubted in *State v. Knight*, 19 Ia., 94.

When at a regular term of the District Court a special term is ordered to be held at a future day fixed, which special term is postponed by the clerk, on the written order of the judge in vacation, it was held that the postponement was regular. *State v. Ballinger*, 10 Iowa, 368.

POWERS OF JUDGES GENERALLY.

A special term of the District Court of one county was ordered for the 30th of November, which was the day fixed by statute for a regular term of the court in another county of the same district. The special term was adjourned to the 10th of the succeeding month. This was held to be within the power of the court to do, and all business done at such special term was legal. *State v. Clark*, 30 Iowa, 170. This settles the case of *State v. Knight*, 19 Iowa, 94, in which the power of the court was doubted. So where a cause is commenced in a term with the *bona fide* expectation and belief that it will be concluded before the day shall arrive when the judge is directed, but not imperatively required, by law to hold court in another county, he may remain and conclude the trial of that case, receive the verdict, and pass judgment, even though this may happen to be done on a day or at a time when regularly he would be holding court in another county. *State v. Knight*, 19 Iowa, 94.

ARGUMENT—OPENING AND CLOSING.

Where, in a prosecution for murder, the defense does not controvert the killing, but denies the necessary malicious intent, the burden of proof to establish such intent being upon the State, the defendant is not entitled to the opening and closing of the argument. *State v. Felter*, 32 Iowa, 49; *Lafrier v. State*, 10 Ohio State, 598.

And, under a statute allowing a defendant to testify and he declines, the public prosecutor should not refer to the fact of the defendant declining to testify. *People v. Tyler*, 8 Am. Law Register, 430; Laws of Iowa, 1878, Chapter 168, page 155. See title, "Evidence."

ARREST, AND BY WHOM, AND HOW MADE.

SECTION 4197. Arrest is the taking of a person in custody in a case, and in the manner authorized by law.

SEC. 4198. An arrest may be made by a peace officer, or by a private person.

SEC. 4199. A peace officer may make an arrest in obedience to a warrant delivered to him.

SEC. 4200. A peace officer without a warrant may make an arrest:

1. For a public offense committed or attempted in his presence;

2. Where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

SEC. 4201. A private person may make an arrest:

1. For a public offense committed or attempted in his presence;

2. When a felony has been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

SEC. 4202. A magistrate may orally order a peace officer, or a private person, to arrest any one committing, or attempting to commit, a public offense in the presence of such magistrate, which order shall authorize the arrest.

SEC. 4203. An arrest may be made on any day, or at any time of the day or night.

SEC. 4204. The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, of his authority to make it, and that he is a peace officer, if such be the case, and require him to submit to

his custody, except when the person to be arrested is actually engaged in the commission of, or attempt to commit, the offense, or flies immediately after its commission, and if acting under the authority of a warrant, he must give information thereof and show the warrant if required.

SEC. 4205. When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

SEC. 4206. To make an arrest, if the offense be a felony, a private person, if any public offense, a peace officer acting under the authority of a warrant, or without a warrant, may break open the door or window of a house in which the person to be arrested may be, or in which they have reasonable grounds for believing he is, after having demanded admittance and explained the purpose for which admittance is desired.

SEC. 4207. Any person who has lawfully entered a house for the purpose of making an arrest under the provisions of the preceding section, may break open the door or window thereof, if detained therein, when necessary for the purpose of liberating himself; and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, and by his command, lawfully entered for the purpose of making an arrest, and is detained therein.

SEC. 4208. Any person making an arrest may orally summon as many persons as he deems necessary to aid him in making the arrest, and all persons failing to obey such summons shall be guilty of a misdemeanor.

SEC. 4209. An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest.

SEC. 4210. No unnecessary force or violence shall be used in making an arrest.

SEC. 4211. A person arrested is not to be subjected to any more restraint than is necessary for his detention.

SEC. 4212. He who makes an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken to be disposed of according to law.

SEC. 4213. If a person, after being arrested, either by a peace officer without a warrant, or by a private person, escape, or be rescued, the person from whose custody he escaped or was rescued, may immediately pursue and retake him in any part of the State, and for that purpose may, if necessary, break open the door or window of a house in which he may be, or in

which he has reasonable ground to believe he is, after having stated his purpose and demanded admittance, and when the person escaping or rescued was in custody under a warrant or commitment, this may be done at any time under the original warrant or commitment.

SEC. 4214. A peace officer may take before a magistrate a person who, being engaged in a breach of the peace, is arrested by a bystander and delivered to him.

SEC. 4215. A private person who has arrested another for the commission of an offense, must, without unnecessary delay, take him before a magistrate or deliver him to a peace officer.

SEC. 4216. A private person who makes an arrest and delivers the person arrested to a peace officer, must also accompany the officer before the magistrate.

SEC. 4217. An officer making an arrest in obedience to a warrant, shall proceed with the person arrested as commanded by the warrant, or as provided by law.

SEC. 4218. When an arrest is made without a warrant, whether by a peace officer or a private person, the person arrested shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made; and the grounds on which the arrest was made shall be stated to the magistrate by affidavit, subscribed and sworn to by the person making the statement before the magistrate, in the same manner as upon a preliminary information, as nearly as may be.

HEARING BEFORE MAGISTRATE.

SEC. 4219. If the magistrate believes from the statement in the affidavit that the offense charged is triable in the county in which the arrest was made, and that there is sufficient ground for a trial or preliminary examination, as the case may require, and that it will not be inconvenient for the witnesses on the part of the state that such trial or preliminary examination should be had before him, he shall proceed as if the person arrested had been brought before him on arrest under a warrant, and if the case be one within his jurisdiction to try and determine, shall order an information to be filed against him.

SEC. 4220. If the magistrate believes from the statements in the affidavit that the offense charged is triable in the county in which the arrest is made, and that there is sufficient ground for a trial or preliminary examination, and that it will be more convenient for the witnesses on the part of the State that such trial or examination should be had before some other magistrate, he shall, by a written order by him signed with his name of office, commit the person arrested to a peace

officer, to be by him taken before such magistrate in the same county who has jurisdiction to try or examine the charge as the case may require, and as shall be convenient for the witnesses on the part of the State, and deliver the affidavit and the order of commitment to the peace officer, who shall proceed with the person arrested as directed by the order; and such magistrate, when the person arrested is brought before him, shall proceed as on an arrest under a warrant, and, if the case be within his jurisdiction to try and determine, shall order an information to be filed against the person arrested.

SEC. 4221. If the magistrate believes from the statements in the affidavit that the offense charged is triable in a county different from that in which the arrest is made, and that there is sufficient ground for a trial or preliminary examination, he shall, by a written order by him signed with his name of office, commit the person arrested to a peace officer, to be by him taken before a magistrate in the county in which the offense is triable, who has jurisdiction to make either preliminary examination into the charges or try and determine the same, as the case may require, and, if the offense be a misdemeanor only triable on indictment, shall fix in the order the amount of bail which the person arrested may give for his appearance at the district court of the county in which the offense is indictable, on the first day of the next term thereof, to answer an indictment.

SEC. 4222. If bail be given as provided in the preceding section, it may be either before the magistrate making the order, or the magistrate in the county in which the offense is triable before whom he is taken under the order, or a magistrate of any county through which he passes in going from the county in which the arrest was made to that in which the offense is triable, or the clerk of the district court of either of said counties; and when given, the magistrate or clerk taking the same shall make on the order of commitment an order for the discharge of the person arrested from custody, who shall forthwith be discharged accordingly, and to transmit by mail, or otherwise, to the clerk of district court of the county at which the person arrested is bound to appear, on or before the first day of the next term thereof, and as soon as it can be conveniently done after taking the bail, the affidavits, the order of commitment and discharge, together with the undertaking of the bail, who shall file the same together in his office.

SEC. 4223. If bail be not given as provided in the last two sections, before the magistrate in the county in which the arrest was made, or if the offense charged is a felony, or a

misdemeanor, triable on information. the magistrate must deliver the affidavits and the order of commitment to a peace officer, who shall proceed with the person arrested as directed by the order, or provided by law; and the magistrate in the county in which the offense is triable, when the person arrested is brought before him, shall proceed as on an arrest under a warrant, and if the case be within his jurisdiction to try and determine, shall order an information to be filed against the person arrested.

SEC. 4224. In the cases contemplated in the last three sections, the officer having the person arrested in custody, under the order, shall take him before the proper magistrate in the county in which the offense is triable, which is most convenient for the witnesses on the part of the State, unless, in case of a misdemeanor triable on indictment as hereinbefore provided, the person arrested desires to give bail, in which case he shall take him before the most convenient magistrate in the county in which the offense with which he is charged is triable, or any county through which he passes in going from the county in which the arrest was made to the county in which the offense is triable, or before the clerk of the district court of either of said counties for the purpose of giving bail.

SEC. 4225. In all cases, the peace officer, when he takes a person committed to him under an order as provided in this chapter before a magistrate, or clerk of the district court, either for the purpose of giving bail, if bail be taken, or for trial or preliminary examination, must make his return on such order and sign such return with his name of office, and deliver the same to the magistrate or clerk.

ARREST WITHOUT WARRANT—PEACE OFFICER.

A peace officer may arrest a person for an offense committed or attempted in his presence. *Hutchinson v. Sangster*, 4 G. Greene, 340, and, under section 4200, Code of 1873, without a warrant.

DETENTION OF PRISONER.

At common law an officer had the power to detain the offender until he could be taken before a magistrate for examination, and for that purpose he might be committed to jail (*Arnold v. Stevens*, 10 Wend., 514; 4 G. Greene, 342), and the power to detain in custody for a reasonable time, when an offense has been committed or attempted, is indispensable to the duties of a peace officer—the power is inherent. *Ib.*

APPEALS AND TRIAL OF THE APPEAL.

4520. The mode of reviewing in the Supreme any judgment, action, or decision of the District Court in a criminal case, is by an appeal.

4521. Either the defendant or the State may take an

4522. No appeal can be taken until after judgment, and only within one year thereafter.

4523. An appeal is taken by the party taking it, or attorney of such party, serving on the adverse party, or attorney of the adverse party who acted as attorney of record in the District Court, at the time of the rendition of the judgment, and also on the clerk of the District Court by whom the judgment was rendered, a notice in writing of the taking of the appeal from the judgment.

4524. The appeal is deemed to be taken when the notice thereof, required by the last section, are filed in the office of the clerk of the court in which the judgment was rendered, with evidence of the service thereof indorsed thereon, and a receipt therefor.

4525. When an appeal is taken, it is the duty of the clerk of the court in which the judgment was rendered, without unnecessary delay, to make out a full and perfect transcript of all papers in the case on file in his office, except the original, and return it by the examining magistrate on the preliminary examination, where there has been one, and of all entries in the record book, and certify the same under his hand and seal of the court, and transmit the same to the clerk of the Supreme Court.

4526. When several defendants are indicted and tried, any one or more of them may join in taking the appeal, but those of their co-defendants who do not join shall not be entitled to the benefit thereof, yet they may appeal afterward.

4527. An appeal taken by the State, in no case, stays the execution of a judgment in favor of the defendant.

4528. An appeal taken by the defendant does not stay the execution of the judgment, unless bail be put in, except as provided in the next section.

4529. Where the judgment is imprisonment in the penitentiary, and an appeal is taken during the term at which the judgment is rendered, and the defendant is unable to give bond, and that fact is satisfactorily shown to the court, it may, in its discretion, order the sheriff or officer having the defendant in custody, to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desire it.

SEC. 4530. When an appeal is taken by the defendant, and bail is put in, it is the duty of the clerk to give forthwith to the defendant, his agent or attorney, a certificate under his hand and the seal of the court, stating that an appeal has been taken and bail put in, and the sheriff or other officer having the defendant in custody, must, upon the delivery of such certificate to him, discharge the defendant from custody where imprisonment forms any part of the judgment, and cease all further proceedings in execution of the judgment, and return forthwith to the clerk of the court who issued it, the execution or certified copy of the entry of judgment under which he acted, with his return thereon, if such execution or certified copy has been issued, and if such execution or certified copy has not been issued, it shall not be issued, but shall abide the judgment on the appeal.

SEC. 4531. The party taking the appeal is known as the appellant, the adverse party as the appellee, but the title of action shall not be changed in consequence of the appeal; it shall be docketed in the Supreme Court as it was in the district court.

SEC. 4532. Appeals, in criminal cases, shall be docketed in the Supreme Court for trial at the commencement of that portion of the term which has been assigned for trying causes from the judicial district from which the appeal comes. They shall take precedence of all other business, and shall be tried at the term at which the transcript is filed, unless continued for cause, or by consent of the parties, and shall be decided, if practicable, at the same term.

SEC. 4533. The personal appearance of the defendant in the Supreme Court on the trial of an appeal, is in no case necessary.

SEC. 4534. An appeal shall not be dismissed for any informality or defect in taking the appeal, if the same be corrected in a reasonable time, and the Supreme Court must direct how it shall be corrected.

SEC. 4535. No assignment of error, or joinder in error, shall be necessary.

SEC. 4536. The defendant shall be entitled to close the argument.

SEC. 4537. The opinion of the Supreme Court must be in writing, filed with its clerk and recorded.

SEC. 4538. If the appeal was taken by the defendant from a judgment against him, the Supreme Court must examine the record, and without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands. It may affirm, reverse, or modify the judgment, and render such judg-

ment as the district court should have rendered, and may, if necessary or proper, order a new trial. It may reduce the punishment, but cannot increase it.

SEC. 4539. If the appeal was taken by the State, the Supreme Court cannot reverse the judgment, or modify it so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings, or in the measure of punishment, and its decision shall be obligatory on the district court, as the correct exposition of the law.

SEC. 4540. If a judgment against the defendant be reversed without ordering a new trial, the Supreme Court must direct, if the defendant be in custody, that he be discharged, or if he be admitted to bail, that his bail be exonerated, or if money be deposited instead of bail, that it be refunded to him.

SEC. 4541. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the Supreme Court shall direct, except as hereinafter provided.

SEC. 4542. When a judgment of the Supreme Court is rendered it must be recorded, and a certified copy of the judgment must be forthwith remitted to the clerk of the district court in which the judgment appealed from was rendered, with proper instructions and a copy of the opinion, in such time, and in such manner, as the Supreme Court may, by rule, prescribe.

SEC. 4543. After the certified copy of the entry of the judgment of the Supreme Court, and its instructions have been remitted as provided in the preceding section, the Supreme Court has no farther jurisdiction of the proceedings therein, and all proceedings which may be necessary to carry the judgment of the Supreme Court into effect, must be had in the court to which it is remitted, or by the clerk thereof, except as provided in the next two sections.

SEC. 4544. Unless where some proceedings in the district court are directed by the Supreme Court, a copy of the certified copy of the judgment of the Supreme Court, with its directions, certified by the clerk of the District Court to whom the same has been transmitted, delivered to the sheriff, or other proper officer, shall authorize him to execute the judgment of the Supreme Court, or take any steps to bring the proceedings to a conclusion, except as provided in the next section.

SEC. 4545. If a defendant, who has been imprisoned during the pendency of an appeal, upon a new trial ordered by the Supreme Court shall be again convicted, the period of his former imprisonment shall be deducted by the district court from the period of imprisonment to be fixed on the last verdict of conviction.

Notice of Appeal.

STATE OF IOWA, } In the District Court for . . county, on a charge of grand lar-
 vs. } ceny.

. }
To J. L., Clerk of the District Court:

A B, the defendant, and L M, attorney for defendant: You, and each of you are hereby notified that the State has appealed from the order and judgment of the District Court of Linn county, Iowa, rendered in the above entitled cause, on the . . day of June, 1877, to the Supreme Court of Iowa, and that the same will stand for trial in said court, at the October Term, 1878, of all which take due notice.

MILO P. SMITH,
Dist. Att'y, 8th Judicial Dist.

The same notice will answer by inserting that the defendant has appealed instead of the State. While it may not be necessary for the State to serve a notice of appeal on defendant, it might be as well to do so, in order to save any question, in pursuance of sections 4524 and 4525, of the Code of 1873, as under the former section the appeal is deemed to be taken *when* the notice is filed.

Appeal Bond.

We, the undersigned, A B, as principal, and C D, as surety, are held and firmly bound unto the State of Iowa, in the penal sum of one thousand dollars, well and truly to be paid unto the said State of Iowa, upon conditions, as follows: Whereas, the said A B, has appealed from the order and judgment of the District Court of . . county, Iowa, rendered on the second day of June, 1878, in a proceeding wherein the State of Iowa was plaintiff, and the said A B, was defendant, on a charge of grand larceny, and convicted thereof, and by said court sentenced to pay a fine of two hundred dollars, or to be confined in the State penitentiary for the term of one year.

Or, if the appeal be from a judgment imposing a fine:

Now, if the said A B, will prosecute his appeal and will pay said fine adjudged against him, or so much of the same as the Supreme Court may direct, and in all respects abide the orders and the judgment of the Supreme Court upon the appeal,

Or, if the appeal be from a judgment of imprisonment, then add as the condition:

That if the said A B, will surrender himself in execution of the judgment and direction of the Supreme Court, and in all respects abide the orders and judgment of the Supreme Court upon the appeal, then this obligation to be void, otherwise in full force.

A . . B . . , *Principal.*
 C . . D . . , *Surety.*

Marion, Iowa, June 7, 1878.

Sureties must justify as required by Sec., 4588, Code, 1873, clerk's certificate of bail being given.

Clerk's Certificate.

THE STATE OF IOWA, } In the District Court of . . county, Iowa.
 vs. } On indictment after conviction on a charge of grand
 } larceny.

I, J L C, clerk of the District Court of . . county, Iowa, do hereby certify that A B, the defendant in the above entitled cause, has taken an appeal to the Supreme Court, and has furnished good and sufficient bail, as by order of court required.

Given under my hand and the seal of said District Court, at my office in county, Iowa, June . . , 1878.

[SEAL]

J . . L . . , *Clerk Dist. Court.*

APPEAL—DOES NOT LIE WHILE PENDING IN COURT BELOW, EVEN BY CONSENT.

Where a cause is still pending in a court below, the Supreme Court will not entertain the question, although by the consent of parties, as no appeal can be taken until after final judgment. *Long v. Walling*, Morris, 381; *Chapman v. Morgan*, 2 G. Greene, 374; *Ginn v. Rogers*, 4 Gilm., Ill., 131; *Kenney v. Greer*, 13 Ill., 432; 6 Texas, 263; *Rutter v. State*, 1 Ib., 99. Since the above decisions, it is held that an appeal lies from an interlocutory order, and previous to final judgment. *State v. Brandt*, 41 Iowa, 642, BECK, J., *dissenting*, page 648. This case of *State v. Brandt*, 41 Iowa, 642, was subsequently overruled, and it is now held that no appeal lies from an intermediate order or decision, and can only be taken from a final judgment. *State v. Swearingen*, 43 Iowa, 336; *State v. Davis*, Western Jurist, May No., 1878, page 310.

ATTORNEY GENERAL AND DISTRICT ATTORNEY—WHICH HAS CONTROL OF CAUSE.

A criminal cause is under control of the district attorney until the Supreme Court acquires jurisdiction, after which it is under the sole control of the Attorney General. *State v. Fleming*, 13 Iowa, 443.

TIME—LIMITATION.

A criminal cause cannot be appealed to the Supreme Court after the expiration of one year from the rendering of the judgment complained of, even by consent of the attorney for the State. Section 4522, Code of 1873; *State v. Fleming*, 13 Iowa, 443.

TRIAL IN SUPREME COURT ON APPEAL.

Under section 4925, Rev., 1860, and section 4538, Code of 1873, if the appeal is taken by the defendant the court must examine the record, and, without regard to technical errors and defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands. *State v. Mercer*, 19 Iowa, 570; *State v. Potter*, 28 Ib., 554; *State v. Brandt*, 41 Iowa, 595. But where a cause has been submitted upon the transcript alone, without abstract

or argument, and the transcript does not show that any bill of exceptions embodying the evidence has ever been signed by the judge who tried the cause, the court will not review the facts in this state of the records. *State v. Rinehart*, Western Jurist, June No., 1878, page 376.

WAIVER OF RIGHT TO APPEAL BY PAYMENT OF FINE.

By a voluntary payment of a fine adjudged against the defendant, he waives his right to appeal. *State v. Westfall and Mathews*, 37 Iowa, 577.

APPEAL BY STATE—EFFECT OF.

Under section 4521, Code of 1873, either the defendant or the State may take an appeal. And where the State appeals the judgment of the Supreme Court cannot interfere with the judgment of the District Court so as to affect the rights of defendant, he having once been tried and acquitted. The result of the appeal would only be to settle an opinion of law. *State v. Kinney*, Western Jurist, January No., 1877, page 49.

For appeals from justices' courts, see "Proceedings and Trials before Justices of the Peace."

It is held in *People v. Corning*, where the defendant was acquitted in the court below, that a writ of error does not lie for the prosecution (2 N. Y., 1; 1 Leading Cr. Cases, 425), while in *Regina v. Chadwick*, 10 Law Report, the prosecution brought a writ of error; but in this case the question as to the right to bring the writ was not determined. It also may be inferred from what is said by Lord Coke (3 Inst., 214, and Hale's P. C., Vol. 2, pp. 247, 248, 394 and 395), that the prosecution may sue out a writ of error. The same was also intimated in case of *People v. Onondago General Sessions*, 2 Wend., 631. Writs of error have also been brought by the people in the following cases: *People v. Stone*, 9 Wend., 182; *People v. Fisher*, 14 Wend., 9; *People v. Cone*, 15 Wend., 277; *People v. Brown*, 16 Wend., 561; *People v. Adsit*, 2 Hill, 619; *People v. Cady*, 6 Wend., 490; *People v. Payne*, 3 Denio, 88, 91, 99, 101; *People v. Adams*, 3 Denio, 109; but the question as to the right to bring the writ was not raised, while it was held in *State v. Buchanan*, 5 Hare and John., Md., 317, that the State may bring error. It is held in

State v. Vanhorton, 26 Iowa, 402, that a writ of error will lie for the defendant but not against him.

DISMISSAL OF APPEAL.

Where a prisoner escapes and the appeal which he has taken after a conviction is dismissed, he cannot have his cause reinstated until he surrenders himself to legal custody. *Gresham v. State*, 1 Texas Court of Appeals, 458; 10 Bush (Ky.), 526.

ARRAIGNMENT OF THE DEFENDANT.

SECTION 4327. As soon as practicable after an indictment is found, the defendant must be arraigned thereon, unless he waive the same; but where a corporation is defendant, arraignment shall not be required.

SEC. 4328. If the indictment be for a felony, the defendant must be personally present, but if for a misdemeanor only, his personal appearance is unnecessary, and he may appear upon arraignment by counsel.

SEC. 4329. When he is in custody, the court must direct the officer in whose custody he is to bring him before it to be arraigned, and the officer must do so accordingly.

SEC. 4330. If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for arraignment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or of the money deposited, may, on motion of the district attorney, make an order directing the clerk to issue a bench warrant for his arrest, and fix the amount in which bail will be taken if the offense be bailable.

SEC. 4331. The clerk, on the application of the district attorney, may, accordingly, at any time after the order, whether the court be in session or not, issue a bench warrant into one or more counties of this State for the arrest of the defendant.

SEC. 4332. If the defendant appear for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel, and if he does, and is unable to employ any, must allow him to select, or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours.

SEC. 4333. The arraignment may be made by the court, or by the clerk or district attorney under its direction, and consists in reading the indictment to the defendant, and unless

previously done, delivering to him a copy of the indictment and the indorsements thereon, and informing him that if the name by which he is indicted is not his true name, he must then declare what his true name is, or be proceeded against by the name in the indictment, and asking him what he answers to the indictment.

SEC. 4334. If he gives no other name, or gives his true name, he is thereafter precluded from objecting to the indictment upon the ground of being therein improperly named.

SEC. 4335. If he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted.

SEC. 4336. In answer to the arraignment, the defendant may move to set aside the indictment, or he may demur or plead to it, and is entitled to one day after arraignment in which to answer thereto if he demand it.

ARRAIGNMENT OF PRISONER—IF CHARGED WITH FELONY MUST BE PERSONALLY PRESENT.

Under section 4328, Code of 1873, if the defendant is charged with a felony he must be personally present, but if charged with a misdemeanor his presence is not required. He can plead by an attorney. Roscoe's Cr. Ev., page 194, 7th edition. In a misdemeanor the defendant can be tried in his absence. *City of Bloomington v. Heland*, 67 Ill., 278; 1 Am. Cr. R. (Hawley), 600.

WAIVER—DECLINING TO GIVE NAME.

Under section 4334, Code of 1873, if the defendant gives a wrong name, he cannot afterward object to an indictment on the ground of being improperly named. *State v. White*, 33 Iowa, 17; *State v. Winstrand*, 37 Iowa, 111.

DEFENDANT REFUSING TO PLEAD.

If a prisoner refuses to plead it is the duty of the court to enter a plea of not guilty. Roscoe's Cr. Ev., page 194.

WAIVER OF ARRAIGNMENT—APPEARANCE AND PLEA.

Where the prisoner appears and pleads, that waives the arraignment. *State v. Winstrand*, 37 Iowa, on page 112; *People v. Frost*, 5 Parker, Cr. R., 52.

DEFENDANT HAS A RIGHT TO HAVE INDICTMENT READ TO HIM.

On a trial for a felony the prisoner is entitled to have the indictment read to him. Code of 1873, section 4333; *Reg. v. Dowling*, 3 Cox Cr. Cases, 509.

TIME OF TRIAL AFTER INDICTMENT FOUND.

Under prior decisions if the defendant, previous to the finding of the indictment, has been held to answer, on a preliminary examination, the State can compel him to go to trial at that term. But, if he has not been held to answer, he is not bound to go to trial at the term at which the indictment is found, but is entitled to a continuance until next term as a matter of right, without a showing. *State v. Harris*, 33 Iowa, 356; 36 Iowa, 269. He is not entitled to such a continuance after the cause has been reversed in the Supreme Court. *State v. Harris*, 36 Iowa, 269.

Under section 4723, Rev. of 1860, "if the defendant is in custody, or on bail, or has deposited money instead of bail when the indictment is found, the trial may take place at the same term of the court on a day to be fixed by the court."

It was held under this section that if the defendant previous to the finding of the indictment was held to answer, the State could compel the defendant to go to the trial at the same term that the indictment was found, but if he has not been so held to answer he cannot be compelled to go to trial, but is entitled to a continuance to the next term as a matter of right. *State v. Harris*, 33 Iowa, 356; *Same v. Same*, 36 Iowa, 269. This section of the Revision was left out of the Code of 1873; so that under the Code, the defendant is not entitled to a continuance without a showing, as a matter of right; and this was also held to be the law under section 3006, Rev. of 1860. *State v. Arnold*, 12 Iowa, 479.

ARREST OF JUDGMENT.

SECTION 4491. A motion in arrest of judgment, is an application to the court in which the trial was had, on the part of the defendant, that no judgment be rendered upon a verdict against him, or on a plea of guilty, and shall be granted:

1. Upon any ground which would have been ground of demurrer.

2. When upon the whole record no legal judgment can be pronounced.

SEC. 4492. The court may also, upon its own observation of any of these grounds, arrest the judgment on its own motion.

SEC. 4493. If the court is of opinion from the evidence on the trial that the defendant is guilty of a public offense, of which no legal conviction can be had on the indictment, he may be held to answer the offense in like manner as upon a preliminary examination.

SEC. 4494. The motion may be made at any time before judgment, or after judgment, during the same term.

After a motion for a new trial has been overruled, the defendant may, in a proper case, move in arrest of judgment that no judgment be rendered on a plea of guilty, or a verdict of guilty, or upon the findings of the court, because of some error appearing on the face of the record, which vitiates the proceedings. As a general rule, any objection to the indictment which would have been fatal on demurrer, may be taken advantage of by motion in arrest, or by writ of error. And if the verdict does not conform to the indictment, or if the trial be by a jury of less than twelve, or if the defendant be tried without the plea of not guilty being entered, the judgment will be arrested. A motion in arrest preceding a motion for a new trial, affirms the verdict and cuts off the motion for a new trial; the motion in arrest being founded solely on matters apparent on the record and cannot be opposed by matters of fact not apparent on the record. Under section 4494, Code of 1873, a motion in arrest may be made at any time before judgment, or after judgment, during the same term, while a motion for a new trial must, under section 4490 of the Code, be made before judgment.

The motion may be in the following form:

STATE OF IOWA, } In District Court of . . . county, Iowa, . . . term, 1877.
vs. }
. } *Motion in arrest of judgment.*

Now comes the defendant in the above entitled cause and asks the court to arrest the verdict and judgment herein for the following reasons [here set out fully all the causes relied on, such as]: *first*, the indictment is insufficient in law, and does not charge a public offense; *second*, the verdict of the jury is insufficient in this, to-wit: etc., etc.

L. A., Attorney for defendant.

A motion in arrest must be granted upon any ground

which would have been a cause of demurrer. *State v. Winstrand*, 37 Iowa, on page 112; *People v. Taylor*, 3 Denio, 91.

MISNOMER ARRAIGNMENT.

The fact that the defendant did not give his true name is not a cause for an arrest of judgment. *State v. White*, 32 Iowa, 17; *State v. Winstrand*, 37 Iowa, on page 112.

BAIL UPON BEING HELD TO ANSWER BEFORE INDICTMENT.

SECTION 4573. When the defendant has been held to answer for any bailable offense, bail must be taken by the magistrate who held him to answer, or by any judge of the Supreme, district, or circuit courts, or by the court to which the papers on the preliminary examination are to be returned by the magistrate who held him to answer, or by the clerk of such court, or by any magistrate of the county in which the offense is triable.

SEC. 4574. Bail is put in by a written undertaking, executed by one or more sufficient sureties (with or without the defendant, in the discretion of the court, clerk, or magistrate), acknowledged before, and accepted by, the court, clerk, or magistrate taking the same, and may be, substantially, in the following form:

County of.

An order having been made on the.....day of..... A. D. 18.., by A. B., a justice of the peace of the township of..... (or as the case may be), that C. D. be held to answer upon a charge of (stating briefly the nature of the offense), upon which he has been duly admitted to bail, in the sum of.....dollars.

We, E. F. (stating his place of residence and occupation), and G. H., of (stating his place of residence and occupation), hereby undertake that the said C. D. shall appear at the district court of the county of....., at the next term thereof, and answer said charge, and abide the orders and judgment of said court, and not depart without leave of the same, or if he fail to perform either of these conditions, that we will pay to the State of Iowa the sum of.....dollars (inserting the sum in which the defendant is admitted to bail).

E. F.

G. H.

Acknowledged before, and accepted by me as....., in the township of.....in the county of....., this..... day of....., A. D. 18..

I. J., justice of the peace
(Or, as the case may be).

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SEC. 4575. The qualifications of bail are as follows:

1. Such bail must be a resident and householder, or freeholder, within the State;

2. Such bail must be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the court, clerk, or magistrate taking the bail, may allow more than one bail to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to one sufficient bail.

SEC. 4576. The bail must in all cases justify, by affidavit taken before the court, clerk, or magistrate, as the case may be, taking such bail, and the affidavit must state that they each possess the qualifications prescribed in the last section.

SEC. 4577. The district attorney, or the court, clerk, or magistrate, as the case may be, may thereupon further examine the bail upon oath, concerning their sufficiency, in such manner as may be deemed proper.

SEC. 4578. The court, clerk, or magistrate, may also receive other testimony, either for or against the sufficiency of the bail.

SEC. 4579. When the examination is closed, the court, clerk, or magistrate, must make an order, either allowing or disallowing the bail, and must forthwith cause the same, with the affidavits of justification, and the undertaking of bail, to be filed with the clerk of the court to which the papers on the preliminary examination are required to be sent.

SEC. 4580. Upon the allowance of the bail and the execution of the undertaking, the court, clerk, or magistrate, must make an order, signed with the name of office, for the discharge of the defendant, to the following effect:

THE STATE OF IOWA:

To the sheriff of the county of.....

C. D., who is detained by you on commitment, to answer a charge for the offense of (here designate it generally), having given sufficient bail to answer the same, you are commanded forthwith to discharge him from custody.

Dated at....., in the township of....., in the county of....., this....day of....., A. D. 18..

K. L., justice of the peace
(Or, as the case may be).

SEC. 4581. If the bail be disallowed, the defendant must be detained in custody until other bail be put in and justify.

BAILABLE OFFENSES.

Under section 12, article 1, Bill of Rights, Constitution of Iowa: "All persons shall, before conviction, be bailable by

sufficient sureties, except for capital offenses where the proof is evident or the presumption great." Under section 3845, Code of 1873, "treason is not aailable offense." Under section 4107, Code of 1873, "all defendants areailable both before and after conviction by sufficient surety except for offenses heretofore punishable with death under the laws of the State, where the proof is evident or the presumption great." The abolishment of capital punishment under the Code of 1873, since repealed by chapter 165, laws of 1878, in this State, did not change the law heretofore existing as to bail. As to bail after conviction in murder cases, see title "Murder."

BAIL—VOLUNTARY APPEARANCE.

Where a defendant voluntarily appears before a magistrate, previous to the examination as to the commission of a crime, the magistrate should not, in general, admit the defendant to bail on the statement of the defendant or the evidence of his witnesses, but should subpoena the witnesses for the State, in order to ascertain the facts in the case, as to the commission of the offense, or the aggravation thereof, and so as to guide him in the amount the defendant should enter into; the evidence should be reduced to writing, and the right should be given the defendant to cross-examine the witnesses so introduced. This evidence, with the bond, should be returned to the clerk of the District Court.

DISCRETIONARY POWER OF MAGISTRATE.

The fact that defendant is charged with an offense punishable with death, would not justify a recognizing magistrate in refusing bail, if the proof was slight, or that which was offered tended to show that it was an offense committed under mitigating circumstances, and would not be punishable with death. *State v. Klingman*, 14 Iowa, on page 408.

DEFENDANT'S NAME OMITTED ON BOND, EFFECT OF.

Under section 4574, Code of 1873, the fact of defendant's omitting to sign the bail bond does not vitiate the same. *State v. Patterson*, 23 Iowa, 575; *State v. Minor*, 1 Blackf., 236.

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DESCRIPTION OF OFFENSE IN BOND.

The name of the offense is sufficient in the bond without a particular description thereof. *State v. Marshall*, 21 Iowa, 143; *State v. Hamer*, 2 Ind., 371.

WHAT MAGISTRATE TO DECIDE AS TO PRESUMPTION OF GUILT.

It is the magistrate who prescribes the amount of bail that is to decide whether the proof is evident, or the presumption great. *State v. Summons*, 19 Ohio, 139.

MAGISTRATE MAY EXAMINE RECORD OF CORONER.

On a question of admitting to bail on a charge of homicide the court will look into the examination taken before the coroner. *People v. Beigler*, 3 Park. Cr. R., 316.

INCREASE OF BAIL.

In a proper case, the court may increase the amount of bail from that demanded by the committing magistrate. *People v. McKinnon*, 1 Wheeler Cr. Cases, 170.

JURISDICTION OF MAGISTRATE AFTER BAIL.

After the defendant has entered into a recognizance of bail for his appearance before the court, the jurisdiction of the magistrate is at an end. He cannot subsequently discharge the defendant. *Sand Rock v. Knop*, 34 How. Pr., 191.

ACTS OF MAGISTRATE JUDICIAL.

The acts of a magistrate in taking bail are judicial; and it is his duty to look into the nature of the charge. *Regina v. Badger*, 4 Q. B., 468; *Lindford v. Fitzroy*, 13 Q. B., 240; 1 Ellis & Blackburn Q. B., 1.

BY UNITED STATES COMMISSIONER—NO GREATER POWER THAN MAGISTRATE.

A United States commissioner, as respects the taking of bail, has the same power as a State magistrate, and no greater. *U. S. v. Hortons*, 2 Dillon C. C., 94; 1 Gr. Cr. R., 431.

DATE IN BOND.

The date of the recognizance for the defendant's appearance in court may be the day on which he is required to appear. *State v. Bradley*, 1 Blackf., 83.

BOND TAKEN BY JUSTICE FOR APPEARANCE AT FUTURE DAY.

A recognizance taken by a justice of the peace for the appearance before him at a subsequent day of a party accused of a crime, is not void for not showing that it was attested by the justice. *State v. Ross*, 6 Blackf., 315.

GIVING BAIL IN A STATE OTHER THAN WHERE THE OFFENSE WAS COMMITTED.

A person arrested in another State or district than the one in which the offense is committed, is entitled to give bail for his appearance before the proper court, and he cannot be removed from the State or district where he is arrested until after he has been imprisoned for not giving the required bail. *Bagnall v. Ableman*, 4 Wis., 163.

ABOLISHMENT OF CAPITAL PUNISHMENT—ADMISSION TO BAIL.

Under the Wisconsin law, since the abolishment of capital punishment, persons charged with murder are, in all cases, bailable. *State in re Perry*, 19 Wis., 676.

BAIL AFTER EXCEPTIONS.

Where exceptions, in a criminal case, are transmitted to the Supreme Court for review before sentence, that court has no power to admit the defendant to bail. *People v. McKinney*, 9 Mich., 444.

BAIL TAKEN AND BOND APPROVED IN OPEN COURT.

Under Sec. 3219, Code of 1851, which is substantially the same as Sec. 4573, Code of 1873, a recognizance to appear and answer to an indictment may be acknowledged and approved in open court. *State v. Elgin*, 11 Iowa, 216.

BAIL UPON AN INDICTMENT BEFORE CONVICTION.

SECTION 4582. When the offense charged in the indictment is a misdemeanor, the officer serving the bench warrant, if therein required, must take the defendant before a magistrate in the county in which it was issued, or in which he is arrested, or before the clerk of the District Court of either of such counties, for the purpose of giving bail.

SEC. 4583. If the offense charged in the indictment be a felony, the officer arresting the defendant must deliver him into custody according to the command of the warrant.

SEC. 4584. When the defendant is so delivered into custody, if the felony charged be bailable, bail must be taken by that

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court, or the clerk of that court, or by any magistrate in the same county.

SEC. 4585. The bail must be put in by a written undertaking, executed by one sufficient surety, with or without the defendant, in the discretion of the court, clerk, or magistrate, acknowledged before and accepted by the court, clerk, or magistrate, taking the same, and may be substantially in the following form:

COUNTY OF

An indictment having been found in the District Court of the county of, on the day of, A. D. 18.., charging A. B. with the crime of (designating it as in the bench warrant), and he having been duly admitted to bail in the sum of dollars:

We, A. B., of (stating his place of residence and occupation), and C. D., of (stating his place of residence and occupation), and E. F., of (stating his place of residence and occupation), hereby undertake that the said A. B. shall appear and answer the said indictment, and abide the orders and judgment of said court, and not depart without leave of the same, or if he fail to perform either of these conditions, that he will pay to the State of Iowa the sum of dollars (inserting the sum in which the defendant is admitted to bail).

A. B.

C. D.

E. F.

Acknowledged before and accepted by me, at, in the township of, in the county of, this day of, A. D. 18..

G. H., Justice of the Peace

(Or as the case may be).

SEC. 4586. The provisions of the preceding chapter, subsequent to the form of the undertaking relative to the qualifications of bail, the justification, the examination, receiving other testimony against the sufficiency, and the order of allowance or disallowance thereof, and the filing of the undertaking with the affidavits, and all proceedings incidental thereto, in the cases therein provided for, apply also to the cases provided for in this chapter.

CLERK AUTHORIZED TO APPROVE BOND.

Under section 3229, Code of 1851, the clerk of the District Court had no power to take bail; but section 4584, Code of 1873, changed the law so as to read, "bail must be taken by that court or the clerk of that court, or by any magistrate in

said county." And the case of *State v. Carothers*, 11 Iowa, 273, was decided under the Code of 1851.

FAILURE TO ACKNOWLEDGE—EFFECT OF.

The failure to acknowledge the bond and justification of sureties, as provided under Sec. 4979, Rev. of 1860, which is the same as Sec. 4585, Code of 1873, does not vitiate the bond, for these matters are directory and formal; and it is Sec. 4979 to which the court refers instead of Sec. 4978, as cited in *State v. Wells*, 36 Iowa, 238.

BOND TAKEN IN ONE COUNTY FOR APPEARANCE IN ANOTHER.

A recognizance executed before the clerk of the District Court of one county for the appearance of defendant before the court of another county wherein the indictment is pending, and where the bond is filed, is not invalid. *State v. Wells*, 36 Iowa, 240.

RELEASE OF BAIL—INSANITY.

Under Secs. 4624 and 4625, Code of 1873, "insanity of defendant before trial or after conviction," if it is found that defendant is insane and he is committed, the bail is exonerated, and entitled to have property or money deposited returned to him.

BAIL UPON AN APPEAL TO THE SUPREME COURT AFTER CONVICTION.

SECTION 4587. After conviction upon an appeal to the Supreme Court, the defendant must be admitted to bail as follows:

1. If the appeal be from a judgment imposing a fine, upon the undertaking of bail that will pay the same, or such part of it as the Supreme Court may direct, and in all respects abide the orders and the judgment of the Supreme Court upon the appeal;
2. If the appeal be from a judgment of imprisonment, upon the undertaking of bail that he will surrender himself in execution of the judgment and direction of the Supreme Court, and in all respects abide the orders and judgment of the Supreme Court upon the appeal. The bail may be taken, either by the court where the judgment was rendered, or the judge thereof, or the District Court of the county in which he is imprisoned, or the judge thereof, or the judge of the Circuit Court of either of such counties, or by the Supreme Court, or a judge thereof, or by the clerk of either of such courts.

SEC. 4588. The bail must possess the qualifications, must justify, and must be put in and taken in the manner prescribed in chapter thirty-eight of this title, and the same proceedings had in all respects, as nearly as applicable, varying to suit the case, and the undertaking of the bail must be, in effect, as prescribed by the preceding section.

BAIL ALLOWABLE WHEN CASE APPEALED TO SUPREME COURT.

Under the statutes of Texas, denying the right of bail to a prisoner after conviction and pending an appeal, is valid and constitutional. *Ex parte Ezell*, 40 Texas, 451; 19 Am. R., 32. While under the Iowa law we have a special provision allowing bail when a cause is so appealed, as provided in the foregoing sections.

For form of an appeal bond see title "Appeals."

BILLS OF EXCEPTION..

SECTION 4479. On the trial of an indictment, exceptions may be taken by the State, or by the defendant, to any decision of the court upon matters of law, in any of the following cases:

1. In disallowing a challenge to an individual juror.
2. In admitting or rejecting witnesses or evidence on the trial of any challenge.
3. In admitting or rejecting witnesses or evidence, or in deciding any matter of law, not purely discretionary, on the trial of the issue.

SEC. 4480. Nothing herein contained is to be construed so as to deprive either party of the right of excepting to any action or decision of the court which affects any other material or substantial right of either party, whether before or after the trial of the indictment, or on such trial.

SEC. 4481. The office of a bill of exceptions is to make a part of the proceedings or evidence appear of record which would not otherwise so appear.

SEC. 4482. All papers pertaining to the cause and filed with the clerk, and all entries made by the clerk in the record book pertaining to them, and showing the action or decision of the court upon them, or any part of them, are to be deemed parts of the record, and it is not necessary to except to any action or decision of the court so appearing of record.

SEC. 4483. Either party may allege an exception to any decision or action of the court, on any application of either party, which may be, and is made orally to the court, in any stage of the proceedings upon which the decision or action of

the court is not required to be, and is not entered in the record book, and reduce the same to writing, and tender the same to the judge, whose duty it is to sign it; and if he sign the same, it shall be filed with the clerk and thereupon become a part of the record of the cause; but if the judge refuse to sign it, such refusal must be stated at the end thereof; and it may then be signed by two or more attorneys or officers of the court, or disinterested bystanders, and sworn to by the person so signing the same, and filed with the clerk, and it shall thereupon become a part of the record of the cause.

SEC. 4484. The judge shall be allowed one day to examine the bill of exceptions, and the party excepting shall be allowed three days thereafter to procure the signatures and file the same.

SEC. 4485. If the judge and the party excepting can agree in modifying the bill of exceptions, it shall be modified accordingly.

SEC. 4486. Time must be given to prepare the bill of exceptions when it is necessary. When it can reasonably be done, it shall be settled at the time of taking the exception.

PRACTICE—BILL OF EXCEPTIONS—CERTIFICATE OF TRIAL JUDGE.

Where the certificate of the judge sufficiently shows the several rulings made during the trial, as to the admission or exclusion of evidence, and that the same were duly excepted to, such paper so certified constitutes the rulings made. *State v. Fay*, 43 Iowa, 651.

Generally, there need be but one bill of exceptions in a cause. The exception may be noted at the time of the decision, and when the trial is ended and the motion for a new trial and in arrest overruled, the complaining party may prepare and settle his bill of exceptions, in which there should be preserved all the points ruled against him in regard to the cause, and upon which he relies for a reversal of the judgment. The object of the bill is to make the matter a part of the record, which would otherwise not be a part thereof. What is in the record proper can never be contradicted by anything contained in the bill of exceptions, but where the bill states the order of events differently from other portions of the record, the bill will be taken as true, because made up more immediately under the eye of the court. There is nothing technical in the form of a bill of exceptions, but it must show the matter complained of and the ground of exception, and clearly

advise the Supreme Court of the proceedings and rulings of the trial court, and that the rulings were excepted to at the time.

The bill may be drawn up in the following manner:

Form of Bill of Exception.

THE STATE OF IOWA,	}	In District Court of . . . county, . . . term, 1878. Indictment for larceny.
vs.		

Be it remembered, that on the trial of this cause in the . . . District Court, at the October term thereof, A. D. 187 . . , the State of Iowa, plaintiff, upon its part produced testimony to the jury tending to prove that [here insert evidence]; and thereupon C D, was introduced and sworn as a witness on the part of the defendant, and the defendant proposed to prove by said witness as follows, to-wit: [here state] To the introduction of said proof, the prosecuting attorney objected, because said proof, as he alleged, was immaterial and irrelevant, and the court sustained the objection and refused to permit said proof to be made by said witness; and to the decision of the court upon said objection, the defendant at the time duly excepted. That upon said trial the court gave the jury the following instructions: [Here insert and note the objection and exception to them.] After which, and at the proper time, the defendant asked the court to give to the jury the following instructions: [here insert and note the refusal of the court and exception thereto.] Whereupon, the jury returned the following verdict: [here insert verdict.] And thereupon the defendant filed a motion to set aside the verdict and for a new trial, as follows: [here insert] Which motion for a new trial having been heard and considered, was by the court overruled, to which decision of the court in overruling said motion for a new trial, the defendant at the time excepted. And, thereupon, the defendant, by his counsel, persented this, his bill of exceptions, and prayed that the same be signed, sealed, and made a part of the record of this cause, which is done accordingly this . . . day of . . . , A D, 187 . .

E . . . F . . . Judge.

CHANGE OF VENUE IN CRIMINAL CASES.

SECTION 4368. In all criminal cases which may be pending in any of the District Courts of this State, any defendant therein may petition the court for a change of venue to another county.

SEC. 4369. Such petition must set forth the nature of the prosecution, the court where the same is pending, and that such defendant cannot receive a fair and impartial trial owing to the prejudice of the judge, or to excitement or prejudice against him in such county, and must verify the same by his affidavit stating the same to be true as he verily believes.

SEC. 4370. When the ground alleged in the petition is excitement and prejudice against him in the county, it must be verified by three disinterested persons, residents of the county from which the change is sought, in addition to the petitioner himself.

SEC. 4371. The petition need not state the facts upon which the belief of the petitioner, or other person verifying the same, is founded, but may allege the belief of the particular ground thereof in general terms.

SEC. 4372. The court may receive additional testimony, by

affidavits only, either on the part of the defendant or the State, when the alleged ground in the petition is excitement and prejudice in the county against the petitioner.

SEC. 4373. The petition and affidavits, if any, must be filed with the clerk, and are parts of the record.

SEC. 4374. The court, in the exercise of a sound discretion, must decide the matter of the petition, when fully advised, according to the very right of it.

LAWS OF 1878, CHAPTER 171.

AN ACT to Amend Section 4374, of Chapter 24, Title XXV., of the Code of 1873.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That section 4374 of the Code of 1873, be and the same is hereby amended by adding thereto the following: "*Provided*, That where application is made for a change of venue on the ground of the prejudice of the judge, by a defendant who has been once tried before said judge upon the same indictment, or when a co-defendant jointly indicted has been so tried, such petition shall be granted."

SEC. 2. This act, being deemed of immediate importance, shall take effect and be in force from and after its publication in the Iowa State Register, and Iowa State Leader, newspapers published at Des Moines, Iowa.

Approved, March 26, 1878.

I hereby certify that the foregoing act was published in the Iowa State Register, and Iowa State Leader, March 30, 1878.

JOSIAH T. YOUNG, *Secretary of State.*

SEC. 4375. If sustained, the court must, if the ground alleged be the prejudice of the judge, order the change of venue to the most convenient county in an adjoining district to which no objection exists.

SEC. 4376. If sustained on the ground of excitement and prejudice in the county, it must be awarded to such county in the same district in which no such objection exists.

SEC. 4377. Upon the making of the order, if there be but one defendant in the case, unless all have joined in the petition, the clerk must make out and certify a transcript of all papers on file in the case, including the indictment, and file the same in his office; and a certified copy of all record entries, and all the original papers on file must be, without unnecessary delay, transmitted to the clerk of the court to which the change of venue is ordered.

SEC. 4378. If there be more than one defendant in the case, and all the defendants have not joined in the petition, the clerk, upon the making of such order, must, without unnecessary delay, make out and certify a transcript of all entries

appearing on the record, and of all the papers on file in the case, including the indictment, and transmit the transcript so certified to the clerk of the court to which the change of venue is ordered, retaining the originals.

SEC. 4379. If a defendant who has applied for a change of venue, which has been ordered, be in custody, the sheriff of the county from which the venue is changed, must, on the order of the court, transfer and deliver such defendant to the sheriff of the county to which such change is allowed, and upon such transfer and delivery, with a certified copy of such order, the sheriff last mentioned must receive and detain the defendant in his custody until legally discharged therefrom, and give a certificate of such delivery.

SEC. 4380. The court to which such change of venue is granted must take cognizance of the cause, and proceed therein to trial, judgment, and execution, in all respects as if the indictment had been found by the grand jury empaneled in such court.

SEC. 4381. In all changes of venue under the provisions of this chapter, the county from which the change of venue was taken shall pay the expenses and charges of removing, delivering, and keeping the defendant, and all other expenses necessary and consequent upon such change of venue and the trial of such defendant, which shall be audited and allowed by the court trying such case.

SEC. 4382. Sheriffs, for delivering prisoners under the provisions of this chapter, are entitled to the same fees therefor as are allowed for the conveyance of convicts to the penitentiary.

SEC. 4383. When any district judge in this State is satisfied from his own knowledge, or otherwise, that any organized county in his district does not contain a sufficient number of inhabitants possessing the qualifications of jurors to compose grand and trial jurors for the presentment and trial of any person or persons, charged with the commission of an offense in said county requiring the intervention of a grand jury, said judge shall make an order transferring all prosecutions for such offenses committed in said county to the next nearest county in the same judicial district possessing the requisite number of inhabitants qualified to serve as jurors.

SEC. 4384. Said order may be made by the judge in vacation, or by the court, and the district court of the county to which said prosecution may be transferred, shall have full and complete jurisdiction of the offense, and the person or persons charged with committing the offense may be indicted and tried in the county to which the prosecution is so transferred, in the same manner as though the offense had been committed in said county.

SEC. 4385. When any prosecution has been transferred by the court or judge under the provisions of this chapter, the person charged with committing the offense shall be required to appear at the next succeeding term of the district court of the county to which the prosecution is transferred, and shall give bond accordingly, and the court or judge may require all material witnesses in behalf of the prosecution to enter into cognizance for their appearance at the district court of the county to which the prosecution is transferred.

SEC. 4386. The county in which the offense was committed, and from which the prosecution was transferred, shall pay all the costs attending the prosecution.

SEC. 4387. No appeal or writ of error shall lie from any order for the transfer of prosecutions made under the provisions of this chapter.

SEC. 4388. The provisions of this chapter apply to prosecutions or charges now pending, or that may hereafter be instituted for offenses heretofore or hereafter committed.

Form of Motion and Affidavit for Change of Venue.

STATE OF IOWA, } In District Court of . . . county, Iowa, . . . term, 1878.

vs.

A. . . B. . . } *Petition for Change of Venue.*

Now comes A B, defendant herein, and states that he is charged with the crime of grand larceny, and now held for trial in the District Court of said . . . county; and that this defendant cannot receive a fair and impartial trial owing to the prejudice of L M, the presiding judge of said District Court. (*Or, if the change is applied for on account of the prejudice of citizens, then add, that the minds of the inhabitants of the said county of . . . are so prejudiced against me that I cannot receive a fair and impartial trial in said county.*) Wherefore this defendant asks that the venue in this cause be changed to the next nearest judicial district (*or, if for prejudice of citizens, that the venue be changed to some other county in this district where such prejudice does not exist.*)

A. B. ———.

I, A B, being duly sworn, on oath, state that the matters and things in the foregoing petition contained are true, as affiant verily believes.

A. B. ———.

Subscribed and sworn to before me, by the said A B, this . . . day of . . . , 1878.

W. G. W. ———, *J. P.*

When the ground alleged in the petition is the excitement and prejudice of the people in the county, it must be verified by three disinterested witnesses in addition to the defendant's affidavit. Such affidavit, attached to the petition, may be in the following form:

STATE OF IOWA, } ss.
. . . COUNTY, }

We, C D, E F, and G H, being duly sworn, on oath, say, that we are acquainted with the defendant in the above entitled cause and some of the circumstances and facts connected with the charge against the said defendant, and that we are all disinterested in the prosecution or defense of the above entitled cause; that we are in no manner related to said defendant, and that we are lawful residents of the county of . . . , and State of Iowa. And we further state that we believe that the excitement and prejudice against the defendant is such that he cannot obtain a fair and impartial trial in said county.

C. D. ———.

E. F. ———.

G. H. ———.

Subscribed and sworn to, before me, this . . . day of . . . , 1878.

W. G. W. ———, *J. P.*

DISCRETIONARY WITH COURT IN GRANTING CHANGE OF VENUE AND NOT A MATTER OF RIGHT.

The law is well settled that the court, in the exercise of a sound discretion, must decide the matter, when fully advised thereof, according to the very right of it; and the appellate court will not interfere with this discretion unless it is clearly shown to have been improperly exercised. Sec. 3272, Code 1851; Rev. 1860, Sec. 4733; Code of 1873, Sec. 4374; *State v. Gordon*, 3 Iowa, 411; *State v. Findley*, 5 Blackf., Ind., 576; *State v. Spencer*, 8 Blackf., Ind., 281; *State v. Barrett*, 8 Iowa, 537. And this rule of the court exercising a sound discretion applies whether the application is grounded upon the alleged prejudice of the judge, or the excitement of the people of the county. *State v. Arnold*, 12 Iowa, 481. As to the exercising a sound discretion, see *State v. Ingalls and King*, 17 Iowa, 9; *State v. Baldy*, 17 Iowa, 39; *State v. Ostrander*, 18 Iowa, 435; *State v. Knight*, 19 Iowa, 94. In criminal cases, it is a matter of discretion. *Turner v. Hitchcock*, 20 Iowa, 310; *State v. Ross & Mann*, 21 Iowa, 467; *State v. Hutchinson*, 27 Iowa, 212; *State v. Felter*, 32 Iowa, 49; *Jones v. C. & N. W. R. R. Co.*, 36 Iowa, 68; *State v. Spurbeck*, 44 Iowa, 667.

ABUSE OF DISCRETION—MUST BE SHOWN BY DEFENDANT BEFORE THE APPELLATE COURT WILL INTERFERE.

While it is discretionary with the court in granting changes of venue, yet when improperly exercised its ruling will be reversed; but such abuse of discretion must be shown by the defendant before the court will interfere. *State v. Leis*, 11 Iowa, 416; *State v. Nash & Redout*, 7 Iowa, 347; *State v. Mooney*, 10 Iowa, 507; *State v. Knight*, 19 Iowa, 94; *State v. Hutchinson*, 27 Iowa, 212; *State v. Beavans*, 37 Iowa, 179.

CHANGE GRANTED ON A GRAVE AND SERIOUS CHARGE.

Where the offense charged is grave and serious in its character, involving, it may be, the life of the prisoner, prudence and a high sense of duty would properly dictate the granting of such a prayer. Conversely, it would be as properly refused if the offense was a misdemeanor, and the punishment light. *State v. Ingalls and King*, 17 Iowa, 9.

CHANGE GRANTED—CLERK'S DUTY—TRANSCRIPT.

Under section 3273, Code of 1851, which reads: "Upon making of such order the clerk must make out and certify a transcript of all the proceedings appearing upon record of the court, which, together with the indictment and all the papers in the cause, must be transmitted to the clerk of the court to which the venue has been changed," it was held that the clerk need not make a copy of the indictment or pleas in the cause, but simply the record entry of what was done; nor need he retain the original and transmit the copies, but such indictment should be attached to the transcript. *State v. Sharp*, 2 Iowa, 455; *People v. Holliday*, 4 Gilman (Ills.), 711; *State v. Beauchamp*, 6 Blackford (Ind.), 299. But under Sec. 4377, Code of 1873, it seems that the clerk should make out a transcript of all papers on file in the case, "including the indictment," and file the same in his office, and transmit the original papers to the county to which the change is taken; and the failure to give the name of the presiding judge is no error. *Waukon-chaw-neek-kaw v. U. S.*, Morris, marginal page, 332, Miller's edition.

DEFENDANT, WHEN A CHANGE IS ALLOWED, MUST GIVE BONDS.

Under section 4385, Code, 1873, if the change is granted the defendant must enter into bonds for his further appearance in the county to where the change is granted. It was held that under a rule of the District Court which provided "that the defendant if the change is granted shall enter into bonds, and on failure thereof the order of the change on motion may be set aside, and the defendant held to trial in the county where the indictment was found" the court had the power to make the rule, and it was proper to set aside the order. *State v. Ensley et al.*, 10 Iowa, 149.

COSTS—WHAT COUNTY TO PAY.

The county from whence the change came is liable to pay the costs. *Shawnee Co. v. Wabaunsee Co.*, 4 Kansas, 312.

ON GROUNDS OF EXCITEMENT AND PREJUDICE.

Where a change of venue is sought on the grounds of excitement and prejudice, caused in part by the publication of false statement in the papers, and no counter affidavits were

filed by the State, in resistance to the application for a change of venue, it should be granted under Code, Sec. 4374; the court has not an absolute and arbitrary discretion in such a case, but a sound judicial discretion, which, if not exercised, the action of the District Court must be reversed. *State v. Canada*, Western Jurist, July No., 1878, p. 434.

CHALLENGING THE JURY.

SECTION 4398. A challenge is an objection made to the trial jurors, and is of two kinds:

1. To the panel;
2. To an individual juror.

SEC. 4399. When several defendants are tried together, they are not allowed to sever their challenges, but must join therein.

SEC. 4400. A challenge to the panel can be interposed only on the ground that they were not selected, drawn, or summoned as prescribed by law.

SEC. 4401. A challenge to the panel must be taken before a challenge to any individual juror, and must be in writing, specifying distinctly and plainly the facts constituting the ground of challenge.

SEC. 4402. A challenge to the panel may be taken by either party, and upon the trial thereof the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

SEC. 4403. If the facts of the challenge be allowed by the court, the jury must be discharged so far as the trial of the indictment in question is concerned. If it be disallowed, the court shall direct the jury to be empaneled.

SEC. 4404. A challenge to an individual juror may be taken orally, and is either:

1. For cause;
2. Peremptory.

SEC. 4405. A challenge for cause may be made either by the State or by the defendant; it must distinctly specify the facts constituting the causes of challenge, and may be made for any of the following causes:

1. A previous conviction of the juror of a felony;
2. A want of any of the qualifications prescribed by statute to render a person a competent juror;
3. Unsoundness of mind, or such defects in the faculties of the mind or the organs of the body as render him incapable of performing the duties of a juror;

4. Affinity, or consanguinity within the ninth degree, to the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance the prosecution was instituted, or to the defendant, to be computed according to the rule of the civil law;

5. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance the prosecution was instituted, or in his employ on wages;

6. Being a party adverse to the defendant in a civil action, or having been the prosecutor against, or accused by him, in a criminal prosecution;

7. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

8. Having served on a trial jury, which has tried another defendant for the offense charged in the indictment;

9. Having been on a jury formerly sworn to try the same indictment and whose verdict was set aside, or which was discharged without a verdict, after the cause was submitted to it;

10. Having served as a juror, in a civil action brought against the defendant, for the act charged as an offense;

11. Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial;

12. Because of his being bail for any defendant in the indictment;

13. Because he is defendant in a similar indictment, or complainant or private prosecutor against the defendant or any other person indicted for a similar offense;

14. Because he is, or, within a year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, and when the defendant is indicted for a like offense;

15. Because he has been a witness, either for or against the defendant, on the preliminary trial or before the grand jury.

SEC. 4406. An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

SEC. 4407. Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry thereon, but his answers shall not afterward be testimony against him.

SEC. 4408. Other witnesses may also be examined on either side; and the rules of evidence applicable to the trial

of other issues shall govern the admission or exclusion of testimony on the trial of the challenge.

SEC. 4409. In all challenges the court shall determine the law and the fact, and must either allow or disallow the challenge.

SEC. 4410. The State shall first complete its challenges for cause, and the defendant afterward.

SEC. 4411. After twelve jurors have been obtained, against whom no cause of challenge has been found to exist, peremptory challenges may be made.

SEC. 4412. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court must exclude him.

SEC. 4413. If the offense charged in the indictment is punishable with imprisonment in the penitentiary for life, or may be so punishable in the discretion of the court, the State is entitled to ten peremptory challenges and the defendant twenty; if any other felony, the State is entitled to six and the defendant to twelve; and if a misdemeanor, the State to three and the defendant to six challenges.

SEC. 4414. The State shall be entitled to the first challenge, and shall challenge one juror; the defendant shall be entitled to the second challenge, and shall challenge two jurors; the State shall be entitled to the third challenge, and shall challenge one juror; the defendant shall be entitled to the fourth challenge, and shall challenge two jurors; and so on, alternately, until all the challenges are exhausted.

SEC. 4415. The challenges of either party need not be all taken at once, but separately in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. To the panel;
2. To an individual juror, for cause;
3. To an individual juror, peremptorily.

SEC. 4416. After each challenge which is allowed, the vacancy occasioned thereby shall, if required, be filled before any further challenge is made, and any new juror thus introduced may be challenged for cause, as well as peremptorily if the peremptory challenges are not exhausted.

SEC. 4417. No juror shall be sworn to try the issue until twelve jurors are accepted.

SEC. 4418. Bias in a juror against either party is no cause of challenge by the other. It may be waived by the party against whom it exists.

CHALLENGE FOR CAUSE—OPINION OF JUROR—DISQUALIFICATION

Where a juror states that, "if what he has heard is true, he has an opinion formed, although, personally, he knows not

ing of the facts or circumstances of the case," it is held a sufficient reason for a challenge for cause. *State of Iowa v. Trimble*, 2 G. Greene, 404.

HAVING FORMED OR EXPRESSED AN OPINION IS GOOD CAUSE FOR CHALLENGE.

It is a well settled principal of law, that where a juror has formed or expressed his opinion on the questions in controversy between the parties to the suit, he may be challenged for cause. *State v. Trimble*, 2 G. Greene, on page 414; *Blake v. Millsbaugh*, 1 Johnson, 316; *Pringle v. Hughs*, 1 Cowen, 432; *Com. v. Knapp*, 9 Pick, 499; *People v. Rathbun*, 21 Wendell, 542; *Com. v. Ruggell*, 16 Pick., 153; *People v. Bodine*, 1 Denio, 281.

A JUROR WHO TRIED THE CAUSE ONCE INCOMPETENT TO ACT AS A JUROR ON SECOND TRIAL.

It is well settled that a juror having tried a cause once, would be incompetent to act as a juror on the second trial. *Spears v. Spencer*, 1 G. Greene, 534.

OPINION MUST BE UNQUALIFIED.

To constitute a good cause of challenge, it should appear that the juror had formed or expressed an unqualified opinion, or belief that the defendant was or was not guilty of the crime charged. The juror answering that he had formed an opinion as to the killing of the deceased, the opinion expressed must be as to the guilt or innocence of the defendant, of the crime laid to his charge. *State v. Thompson*, 9 Iowa 189. Although the juror may have formed an opinion from what he has read in a newspaper, yet, if he answers that he has not made up his mind, and has not an unqualified opinion, he should not be challenged. *People v. Sanders*, 4 Park. Cr. R., 553; *State v. Lawrence*, 38 Iowa, 52, and authorities there cited.

THE FACT THAT QUESTIONS IN RELATION TO THE SAME CASE WERE BROUGHT UP, AND EVIDENCE INTRODUCED BEFORE THE JUDGE, IS NOT A GROUND FOR CHALLENGE TO THE PANEL.

The mere fact that evidence was introduced before the judge in relation to the insanity of the defendant in the presence of the members of the jury, is not a challenge for cause to the panel. *State v. Arnold*, 12 Iowa, 481.

IMPROPER QUESTIONS SUBMITTED TO JURY.

A question "If the defense in the case should be insanity of the defendant, have you formed or expressed an opinion upon the subject," is improper, as it states only a supposed case for such a defense. The defendant may be unable to establish such a defense. *State v. Arnold*, 12 Iowa, 481. The fact that a member of the jury belonged to an association for the purpose of prosecuting horse thieves is no disqualification. *State v. Wilson*, 8 Iowa, 407. Neither is it proper to propound such question to a juror. *State v. Wilson*, 8 Iowa, 407.

A JUROR WHO HAS BEEN ON A SIMILAR TRIAL AS THAT CHARGED IN THE INDICTMENT.

The fact that the juror has been a member of the trial jury who tried a defendant for a similar offense as that charged in the indictment about which the juror is interrogated, is no ground for challenge. That applies only to a case where two or more were jointly indicted, and separate trials had. The juror on one cannot act on the second case as against the second defendant in the same indictment. *State v. Sheeley*, 15 Iowa, 405; *State v. Leicht*, 17 Iowa, 29.

WAIVER OF CHALLENGE BY DEFENDANT—WHEN ESTOPPED FROM MAKING A CHALLENGE.

Where the defendant accepts a jury he waives any objection thereto for bias or prejudice of any character whatever, in the mind of any of the jurors; but if any of the jurors were disqualified, as such, the defendant does not waive his right to objection for this cause. *State v. Groom*, 10 Iowa, on page 316.

WAIVER—KNOWLEDGE OF DEFENDANT OF THE DISQUALIFICATION OF JUROR.

If the defendant knew at the time the jury was sworn that any of them were not qualified to act as jurors, he would have waived his right to object thereafter; but it must appear that the defendant had knowledge of this fact before it can be inferred that he waived his objection. Without this knowledge a waiver cannot be inferred. *Cowles v. Buckman & Son*, 6 Iowa, 162; *State v. Groome*, 10 Iowa, on page 316.

ORDER OF CHALLENGE.

Under Rev. of 1860, Secs. 4779 and 4789, the State was required to complete all its peremptory challenges, or waive the same, before the defendant would be required to commence his; and under that law, the decision was made in *State v. Bowers*, 17 Iowa, 47. But under Chap. 10, laws of 1864, copied into the Code of 1873, as Secs. 4413, 4414, the State is entitled to the first challenge and shall challenge one juror, and then the defendant is entitled to two, &c.

CHALLENGE TO THE PANEL: WHEN TO BE MADE.

Under Section 4401, Code of 1873, a challenge to the panel must be made before commencing with the challenges to individual jurors. It is held that when the defendant had challenged three jurors, and then attempted to challenge the panel, that he was too late, and had waived his right of challenge to the panel. *State v. Bryan*, 40 Iowa, 379; *State v. Davis*, 41 Ib., 315.

FORMATION OF AN OPINION.

A juror who stated upon his examination that he had not formed an opinion as to the guilt or innocence of the accused, but had, in regard to some of the transactions in the case, stating further that he could render an impartial verdict upon the evidence, was held to be a competent juror, and could serve. *State v. Hinkle*, 6 Iowa, 380; *State v. Sater*, 8 Iowa, 420; *State v. Gillick*, 10 Iowa, 98; *State v. Lawrence*, 28 Iowa, 51; *State v. Bryan*, 40 Iowa, 379; *State v. Roy*, 2 Kansas, 405.

CHALLENGE ON THE GROUND THAT THE JUROR HAD SERVED DURING THE YEAR PREVIOUS.

Under Section 239, civil practice, Code 1873, which provides that no person shall be required to attend as trial juror more than two terms in the same year; as to whether this is a cause for challenge *quere*. At least it seems to be without prejudice to defendant if he had an opportunity to challenge peremptorily. *State v. Davis*, 41 Iowa, 311.

ARRAY—CHALLENGE TO THE ARRAY.

There is no such thing known to the Iowa statute as chal-

lenge to the "array;" there are but two kinds of challenges in Iowa: to the panel, or to the individual juror. *State v. Davis*, 41 Iowa, 311.

OPINION FORMED OR EXPRESSED IS SUFFICIENT CAUSE FOR CHALLENGE, WITHOUT STATING THAT THE OPINION IS IN FAVOR OF EITHER PARTY.

It need not appear that the opinion or belief formed or expressed by the juror was in favor of the defendant, or against him. *State v. Shelledy*, 8 Iowa, 481.

COMPETENT—COLORED PERSON QUALIFIED TO SIT AS A JUROR.

Under the act of Congress, passed Feb. 9th, 1867, admitting the State of Nebraska, it was declared that "this act shall not take effect, except upon the fundamental condition, that within the State of Nebraska there shall be no denial of the election franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed." Under this act it is held that a colored man can sit as a juror. *People v. Brittle*, 2 Nebraska, 198.

WAIVER OF CHALLENGE FOR CAUSE.

It does not appear that a party is prejudiced by overruling a challenge for cause, when he voluntarily accepts the jury without exhausting his peremptory challenges. *State v. Elliott*, 45 Iowa, 486.

CONSTITUTIONAL LAW.

LEGISLATIVE POWER.

The Legislature has no power to make the operation or repeal of a law dependent upon a vote of the people. *Santo v. State*, 2 Iowa, 165; *Geebrick v. State*, 5 Iowa, 492; *State v. Weir*, 33 Iowa, 134; also supported in *Thorne v. Cramer*, 15 Barb., 112; *Bradley v. Baxter*, 15 Barb., 122; 1 Am. Law Reg., 658; *Barto v. Heimrod*, 4 Seldon, 483; 4 Harrington, (Del.), 479; *People v. Collins*, 2 Am. Law Reg., 591; *Commonwealth v. Williams*, 11 Penn., 61; *Park v. Commonwealth*, 6 Barr., 507; and those holding such law to be constitutional; *State of Vt. v. Parkes*, 3 Liv. Law Mag., 13; *Johnson v. Rich*, 9 Barb., 680.

COMPROMISING CERTAIN OFFENSES BY LEAVE OF THE COURT.

SECTION 4708. When a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed:

By, or upon an officer while in the execution of the duty of his office;

Riotously; or,

With an intent to commit a felony.

SEC. 4709. If the party injured in such a case, appear before the court to which the papers on a preliminary examination are required to be returned, at any time before trial, on indictment for the offense, or the trial of an appeal in the next court, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom. But in that case the reasons for the order must be set forth therein, and entered upon the minutes.

SEC. 4710. The order authorized by the last section is not a bar to another prosecution for the same offense.

SEC. 4711. No public offense can be compromised, nor can proceedings for the prosecution or punishment thereof, be compromised, except as provided in this section.

CONDUCT OF JURY AFTER CAUSE IS SUBMITTED TO IT.

SECTION 4452. Upon retiring for deliberation, the jury must take with it all papers which have been received as evidence in the case, except depositions and copies of such parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession.

SEC. 4453. The jury may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person.

SEC. 4454. After the jury have retired for deliberation, there must be no disagreement between them as to any part of the testimony, or if they desire to be informed on any point now arising in the cause, they must require the officer to summon them into court, and upon their being brought in, the explanation required must be given in the presence of, or,

after oral notice, to the district attorney, and the defendant or his counsel.

SEC. 4455. If, after the retirement of the jury, one of them be taken sick so as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept together for deliberation, the court may discharge them.

SEC. 4456. Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by the consent of both parties entered upon the record, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

SEC. 4457. In all cases where a jury is discharged or prevented from giving a verdict by reason of any accident or other cause, except where the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term of the court.

SEC. 4458. While the jury is absent the court may adjourn from time to time as to other business, but it shall be nevertheless deemed open for every purpose connected with the cause submitted to the jury until a verdict be rendered or the jury is discharged.

SEC. 4459. A final adjournment of the court discharges the jury.

DISAGREEMENT—DISCHARGE OF—NOTICE AND PRESENCE OF DEFENDANT.

The fact that the prisoner was not present when the jury returned into court, and that the names of the jury were not called, as provided by law, will not operate to reverse a case when it appears that no prejudice could have resulted to the prisoner, though required under section 4454, Code of 1873—*State v. Vaughn*, 29 Iowa, 286.

RECALLING JURY FOR THE PURPOSE OF EXAMINING WITNESS.

The court has power to permit a jury to return from the jury room, after the cause has been submitted to it, for the purpose of examining a witness, on a question misunderstood by them. And the right of counsel to examine the witness under such circumstances is a matter of discretion with the court. *Herring v. State*, 1 Iowa, 206.

For Misconduct of Jurors and Granting New Trials, see title "New Trials."

RIGHTS OF JURY DURING DELIBERATION.

The jury cannot separate, nor are they entitled to meet or board without the permission of the judge. *State v. Baldy*, 17 Iowa, 41.

DEFENSE.

Defenses under particular crimes will be found under that head, and particular crimes to which it applies. As a general principle of law a man may repel force by force in the defense of his person, habitation or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony on either. In such cases he is not obliged to retreat, but may pursue his adversary until he finds himself out of danger. Whartons Cr. Law, 3d ed., 456. And it is held by the Iowa Supreme Court that a person is not required to flee from his adversary, when assailed with a deadly weapon, and retreat to the wall before he can justify the killing of his assailant. *State v. Tweedy*, 11 Iowa, 350. But to make a homicide justifiable, on the ground of self-defense, there must be actual and urgent danger. *Ib.*, 457. *State v. Neeley*, 20 Iowa, 108; *State v. Thompson*, 9 Iowa, 188. It is not necessary however that the danger should in fact exist, but that there be actual and real danger to the defendant's comprehension as a reasonable man. The inquiry is not whether the harm apprehended was actually intended by the assailant, but was actual and real to the accused as a reasonable man as compared with danger remote or contingent. *State v. Neeley*, 20 Iowa, 108; 1 Bishops Cr. Law, 385; Wharton on Homicide, 407; *State v. Collins*, 32 Iowa, 37.

SELF-DEFENSE—CHARACTER OF DECEASED.

On trial for an assault with intent to commit murder, the defendant offered to introduce evidence to show that the person stabbed was a large, powerful and muscular man, who, when under the influence of liquor, was quarrelsome, ugly, dangerous and vindictive; that the defendant knew these facts; and that in the same day and shortly before the com-

mission of the assault the injured person had threatened to take the defendant's life, of which threat defendant had been informed only a few minutes previous to the assault. This evidence should have been admitted under proper instructions of the court. *State v. Collins*, 32 Iowa, 36.

BURDEN OF PROOF OF SELF-DEFENSE.

Where the court instructed the jury in a murder case where the defendant set up self-defence, "If, however, you find that the defendant inflicted the blow upon the deceased that caused his death, then the burden of proof is upon the defendant to show that he did it in self-defence." This instruction the court held to be erroneous; the defendant is entitled to an acquittal if he shows, by the facts attending the commission of the offense, proved either by himself or the State, that there is reasonable doubt that his act was willfull. The rule is different when the matter of defense is wholly disconnected from the body of the offense. *Tweedy v. State*, 5 Iowa, 434; *State v. Murphy*, 33 Iowa, 270; *State v. Felter*, 32, Iowa, 49; *State v. Porter*, 34 Iowa, 241; 1 Greens Cr. R., 241; *State v. Vincent*, 24 Iowa, on page 578.

QUESTIONS NOT RAISED IN COURT BELOW.

Defenses not raised on the trial in the court below cannot be raised in the Supreme Court on appeal. *State v. Grooms*, 10 Iowa, 308; *State v. Malery*, 11 Iowa, 239; *State v. King*, 37 Iowa, on page 468.

IGNORANCE OF LAW.

It is an elementary principle of law that ignorance of the law excuseth no man. *Trulock v. State*, 1 Iowa, on page 518. Yet when it is evident that a prisoner, without fault on his part, has not had a full and impartial trial, a new trial will be ordered, although no one of those circumstances amount to error in law. *Trulock v. The State*, 1 Iowa, 515. This rule is however subject to certain exceptions: Where the law which has been infringed was settled and plain, the maxim, in its rigor, will be applied; but where the law is not well settled, or is obscure, and where the guilty intention being a necessary constituent of the particular offense is dependent on a knowledge of the law, this rule if enforced,

would be misapplied; and ignorance of the law is no defense where the mandates of a statute have been disregarded or a crime has been perpetrated. *Cutler v. State*, 36 N. J., 125; 2 Greens Cr. R., 589; *State v. Goodenow*, 65 Me., 30; 1 Am. Cr. R., 42.

ALIBI.

An alibi of the defendant at the time of the alledged crime is an independent proposition totally inconsistent with the guilt of the prisoner. It is evident the burden of proof rests upon the prisoner; this defense must be sustained by the prisoner, and the evidence necessary to sustain it must be sufficient to outweigh the proof tending to establish its contradictory hypothesis. *State v. Vincent*, 24 Iowa, on page 578.

DEATH RESULTING FROM MALPRACTICE.

Where a wound or injury has been inflicted the defendant cannot show as a defense that the death did result from the effects of malpractice, as it is said by Bigelow Ch. J., in 2 Allen, 136, *Commonwealth v. Hackett*: "Amid the conflicting theories of medical men, and the uncertainties attendant upon the treatment of bodily ailments and injuries, it would be easy in many cases of homicide to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crimes might escape conviction and punishment." Roscoe's Cr. Ev., 3d ed., 703; *King v. Reading*, 1 Keb., 17; 1 East's P. C., ch. 5, Sec. 13; *Regina v. Holland*, 2 M. & Rob., 351; *Commonwealth v. Green*, 1 Ashm., 289; *Regina v. Haines* 2 Car. & Kirw., 368; *State v. Baker*, 1 Jones Law R., N. C., 267; *Commonwealth v. McPike*, 3 Cush., 181; *State v. Murphy*, 33 Iowa, on page 276.

JUSTIFICATION AS A DEFENSE—MASTER, APPRENTICE.

A master may do that to protect his apprentice which another party could not do without being the assailant, or giving considerable provocation for an assault. *Orton v. State*, 4 G. Greene, 140.

EVIDENCE—ARTICLES OF APPRENTICESHIP.

It is competent to introduce and receive articles existing

between the master and his apprentice, where the difficulty arises in relation to the apprentice and a third party. *Orton v. State*, 4 G. Greene, 140.

REASONABLE DOUBT—PREPONDERANCE OF EVIDENCE.

Where the defendant justifies he is not compelled to establish such defense beyond a reasonable doubt, but simply a preponderance of evidence is sufficient to support a verdict of acquittal. *Tweedy v. State*, 5 Iowa, 334.

RAILROAD CONDUCTORS, JUSTIFIED, WHEN.

Where passengers fail to purchase railroad tickets at stations and enter the cars without tickets, it is held to be a proper and legal regulation to compel the passenger to pay ten cents extra, and on his refusal to comply with this regulation the conductor is justified in expelling him, and not criminally liable when the expelling is done without unnecessary force. *State v. Chovin*, 7 Iowa, 204; *State v. Overton*, 4 Zabriskie, 435; *Commonwealth v. Powers*, 7 Metc., 596; 24 Conn., 249; 33 N. H., 343.

TRESPASS—DEADLY WEAPON.

A provocation may reduce a homicide to manslaughter, but never can render it excusable or justifiable. It is equally well settled that a bare trespass (as in this case, the stealing of melons), and trespass against the property of another, not his dwelling, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defense, and if he uses such a weapon, and kills the trespasser, it will be murder, and this though the killing were actually necessary to prevent the trespass. If it appears that the intention was not to take life, but merely to chastise the trespasser, and to deter the offender from repeating the same, the offense may be extenuated and will be no more than manslaughter. If the killing take place in the passion or heat of blood, it may be manslaughter, but cannot be less. Trespass against property, not a *dwelling*, is not such a provocation as will warrant the owner in using a deadly weapon. If he does so, and death ensues, it is murder, because an act of violence beyond the provocation. But if the injury be inflicted with an instrument, and in a manner not likely to kill, and the trespasser should, notwithstanding happen

to be killed, it will be no more than manslaughter, the law so far recognizing the adequacy of the provocation arising from the trespass. Am. Crim. Law, Secs. 970, 975, 1025; *Claxton v. State*, 2 Humph., 181; *McCoy v. State*, 3 Eng., 451; Wharton on Homicide, 168, 185, 466; *Commonwealth v. Drew*, 4 Mass., 391; *Cokley v. State*, 4 Iowa, 477; *State v. Vance*, 17 Iowa, 138.

WORDS DO NOT JUSTIFY AN ASSAULT.

The fact that the deceased used certain or reported slander in relation to defendant's family, is no justification for an assault upon the deceased, much less for taking his life. *State v. Lawrence*, 38 Iowa, 58.

INSANITY AS A DEFENSE—ARGUMENT, OPENING AND CLOSING.

Where the defendant pleaded as a defense insanity, and by reason of such plea insisted upon the right to open and close the argument, the court held, by such plea, the defendant claims that there was no intent to commit the crime, and hence compels the State to prove such and consequently gave it the right to open and close. *Læfrier v. State*, 10 Ohio St., 598; *State v. Felter*, 32 Iowa, 50.

DISTINGUISHED FROM PASSION AND REVENGE.

One who, in possession of sound mind, commits a criminal act under the impulse of passion or revenge, which may temporarily dethrone reason and for the moment control the will, cannot, nevertheless, be shielded from the consequences of the act by the plea of insanity. Insanity will only excuse the commission of a criminal act when it is made affirmatively to appear that the person committing it was insane, and that the offense was the direct consequences of his insanity. *State v. Stickley*, 41 Iowa, 232. So in case of *State v. Felter*, the court instructed: "If the defendant at the time of the commission of the act (if he did commit it), was laboring under such a degree of insanity as irresistibly and uncontrollably forced him to commit the act, have reason sufficient to discriminate between right and wrong in reference to the act about to be committed by him, it is your duty to acquit wholly. In other words, if you believe from the evidence that the defendant's mind, at the time of committing the act, was

so insane that he did not know the nature of the crime, and did not know that he was doing wrong in doing the act, it is your duty to acquit him altogether." This instruction is approved as giving a correct construction of the law. *State v. Felter*, 25 Iowa, 80; also, *Willis v. People*, 4 Denio, 27; *Willis v. People*, 32 N.Y., 715; *State v. Brandon*, 8 Jones, N. C. Law, 463; *Mosler v. Commonwealth*, 4 Bar., 266; *State v. Bruce*, Western Jurist, February No., 1878, page 106. Also an instruction: "When the defendant on account of his mental disease was not able to distinguish right and wrong, and had not knowledge and understanding of the character and consequences of his act, and power of will to abstain from it, he was not a legally responsible being." This was held to be correct. *State v. Mewhirter*, 46 Iowa, 88. Where insanity is interposed as a defense, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time the act is done. *Freeman v. People*, 4 Denio, 28; *Willis v. People*, 32 N. Y., 717; *Flanagan v. People*, 52 N. Y., 467; 11 Am. R., 731.

BEYOND REASONABLE DOUBT.

It was held error to charge a jury in a criminal case that the insanity of the prisoner must be proved beyond a reasonable doubt, to entitle him to an acquittal. *People v. McCann*, 16 N. Y., 58; 11 Am. R., 731.

SELF INFLICTED INSANITY.

Self-inflicted insanity cannot be allowed to avail as a defense; the law in such case imputes to the defendant a murderous intent. *People v. Robinson*, 1 Park Cr. R., 649.

INSANITY BY DRUNKENNESS.

Self-insanity, the immediate consequence of drink, will constitute a defense. "A drunkard," says Lord Coke, "has no privilege thereby; but what hurt or ill soever he does his drunkenness doth aggravate (Coke Litt., 247), it is settled rule, that if the drunkenness be voluntary, it cannot excuse a man from the commission of any crime, but on the contrary must be considered an aggravation of whatever he does amiss." The rule is otherwise when the drunkenness is not voluntary; as, if a person by the unskillfulness of his

physician, or by the contrivance of others, and without any isolation on his own part, eat or drink such a thing as causes frenzy, this puts him in the same condition as other insane persons, and equally excuses him, the frenzy being, not the immediate effect of indulgence in strong drink, but a remote consequence superinduced by antecedent drunkenness. *People v. Robinson*, 2 Park Cr. R., 235. Again it is said in *United States v. Drew*, 1 Leading Crim. Cases, 113: "The question made at the bar is, whether insanity, whose remote cause is habitual drunkenness, is or is not an excuse in a court of law for a homicide committed by the party while so insane, but not at the time intoxicated or under the influence of liquor: we are clearly of opinion that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime; but the crime must take place and be the immediate result of the fit of intoxication, and while it lasts; and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal, in a moral point of view, such indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offense. The law looks to the immediate, and not the remote cause; to the actual state of the party, and not to the causes which remotely produced it. Many species of insanity arise remotely from what in a moral view is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, &c.

Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence."

DEMURRER.

SECTION 4352. The defendant may demur to the indictment when it appears upon its face, either:

1. That it does not substantially conform to the requirements of this code;

2. That the indictment contains any matter, which, if true, would constitute a legal defense or bar to the prosecution.

SEC. 4353. The entry on the record of a demurrer, may be substantially in the following form: "The defendant demurs to the indictment."

SEC. 4354. When the demurrer is put in, the objection thereby presented must be heard immediately, or at such time as the court may appoint.

SEC. 4355. If the demurrer is sustained on the ground that the offense charged was within the exclusive jurisdiction of another county in this State, the same proceedings shall be had as provided in sections four thousand four hundred and forty-six to four thousand four hundred and forty-nine, inclusive, of this code.

SEC. 4356. If the demurrer is sustained because the indictment contains matter which is a legal defense or bar to the indictment, the judgment shall be final, and the defendant must be discharged.

SEC. 4357. If the demurrer is sustained on any other ground than that mentioned in the last two sections, the defendant must be dealt with as provided in section four thousand three hundred and forty-one of this code, unless the court is of opinion, on good cause shown, that the objection can be remedied or avoided in another indictment; in which case the court may order the cause to be re-submitted to the same or another grand jury, and the defendant may be dealt with as provided in section four thousand three hundred and forty-two of this code.

SEC. 4358. If the demurrer is overruled, the defendant has a right to put in a plea. If he fails to do so, final judgment may be rendered against him on the demurrer, and, if necessary, a jury may be empaneled to enquire and ascertain the degree of the offense.

DEMURRER SHOULD BE SPECIFIC AND CERTAIN.

It is well settled that a demurrer to an indictment should not be general, but should specifically state the grounds of

ter, and specify wherein the indictment is insufficient, setting the points clearly to the mind of the court wherein is a defect. *State v. Benham*, 1 Iowa, 542; *State v. Ben*, 5 Iowa, 369; *State v. Mauer*, 7 Iowa, 406; *State v. Ben*, 10 Iowa, 309; *State v. Hart*, 29 Iowa, 269.

DEPOSIT OF MONEY INSTEAD OF BAIL.

SECTION 4589. The defendant, at any time after an order requiring him to bail, instead of giving bail, may deposit with the clerk of the district court to which the undertaking of bail, is required to be sent, the sum mentioned in the order, and upon delivering to the officer in whose custody a certificate under seal from said clerk of the deposit, he shall be discharged from custody.

. 4590. If the defendant has given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in the undertaking, and upon the deposit being made the bail shall be exonerated.

. 4591. If money be deposited as provided in the last section, bail may be given in the same manner as if it had originally been given upon the order for admission to bail at the time before the forfeiture of the deposit. The court or judge before whom the bail is taken shall thereupon certify in the order of allowance, that the money deposited be delivered by the clerk to the defendant, and it shall be released accordingly.

. 4592. When money has been deposited, if it remain on deposit at the time of a judgment against the defendant, the clerk shall, under the direction of the court, apply the same in satisfaction of so much of the judgment as requires payment of money, and after paying the same shall refund the surplus, if any, to the defendant, unless an appeal be taken to the Supreme Court, and bail put in, in which case the deposit shall be returned to the defendant.

DISMISSAL OF CRIMINAL ACTIONS BEFORE AND AFTER INDICTMENT FOR WANT OF PROSECUTION OR OTHERWISE.

SECTION 4613. When a person has been held to answer for a public offense, if an indictment be not found against him at the next regular term of the court at which he is held to answer, the court must order the prosecution to be dismissed, unless a good cause to the contrary be shown.

. 4614. If a defendant indicted for a public offense, and trial has not been postponed upon his application, be

not brought to trial at the next regular term of the court in which the indictment is triable after the same is found, the court must order it to be dismissed unless good cause to the contrary be shown.

SEC. 4615. If the defendant be not indicted or tried as provided in the last two sections, and sufficient reason therefor shown, the court may order the action to be continued from term to term, and in the mean time may discharge the defendant from custody on his own undertaking or on the undertaking of bail for his appearance to answer the charge at the time to which the action is continued, but no such continuance can be extended beyond three terms of the court.

SEC. 4616. If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or if admitted to bail, his bail must be exonerated, and if money has been deposited instead of bail it must be refunded to him.

SEC. 4617. The court may, either upon its own motion or upon the application of the district attorney, and in furtherance of justice, order an action after an indictment to be dismissed, but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record.

SEC. 4618. The entry of a *nolle prosequi* is abolished, and neither the attorney general nor the district attorney shall hereafter discontinue or abandon a prosecution for a public offense except as provided in the last section.

SEC. 4619. An order for the dismissal of the action as provided in this chapter, is a bar to another prosecution for the same offense if it be a misdemeanor; but it is not a bar if the offense charged be a felony.

DISMISSAL—BAR.

The dismissal of a criminal action as provided in the foregoing sections only applies to cases pending in the District or Supreme Court, and is not applicable in justices' courts. It is sometimes erroneously supposed that section 4619 of the Code, that "an order for dismissal is a bar to another prosecution for the same offense," applies to justices' courts.

DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.

SECTION 4654. When property alleged to have been stolen or embezzled comes into the custody of a peace officer, he must hold the same subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

SEC. 4655. On satisfactory proof of title by the owner of the property, the magistrate before whom the information is laid, or who shall examine the charge against the person accused of stealing or embezzling the same, may order it to be delivered to the owner, on his paying the reasonable and necessary expenses incurred in the preservation and keeping thereof, to be certified by the magistrate. The order shall entitle the owner to demand and receive the property.

SEC. 4656. If the property stolen or embezzled come into the custody of a magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified as before provided.

SEC. 4657. If the property stolen or embezzled has not been delivered to the owner, the court before which a conviction is had, may, on proof of his title, order its restoration.

SEC. 4658. If the property stolen or embezzled be not claimed by the owner before the expiration of six months from the conviction of the person for stealing or embezzling it, the magistrate or other officer having it in his custody, must, on payment of the necessary expenses incurred for its preservation, deliver it to the auditor of the county to be applied under the direction of the board of supervisors thereof for the benefit of the poor of the county.

SEC. 4659. When the money or other property is taken from the defendant arrested upon a charge of a public offense, the officer taking it shall, at the time, give duplicate receipts therefor, specifying particularly the amount of money and the kind of property taken; one of which receipts he must deliver to the defendant, and the other he must forthwith file with the clerk of the district court of the county where the depositions and statements are to be sent by the magistrate.

DIVISION OF PUBLIC OFFENSES.

SECTION 4103. Public offenses are divided into:

1. Felonies.
2. Misdemeanors.

SEC. 4104. A felony is a public offense which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary.

SEC. 4105. Every other public offense is a misdemeanor.

SEC. 4106. No person can be punished for a public offense except upon legal conviction in a court having jurisdiction thereof.

SEC. 4107. All defendants are bailable both before and after conviction, by sufficient surety, except for offenses here-

tofore punishable with death under the laws of the State, where the proof is evident, or the presumption great.

Crimes or public offenses, are divided into felonies and misdemeanors, and an act or omission rendering a party liable to a pecuniary forfeiture, which, when collected, goes into the public treasury, does not constitute the act or omission of a crime. *Polk County v. Hierb*, 37 Iowa, 367.

FELONIES—MISDEMEANORS.

An offense which the court has the discretion to punish by imprisonment in the state prison, or by fine, or by imprisonment in the county jail, is a felony. *People v. Van Steenburgh*, 1 Park. Cr. R., 39; *People v. Borges*, 6 Abbot's Pr., 132.

ERROR WITHOUT PREJUDICE.

As a general principal of law the admission of improper evidence, erroneous instructions and ruling of the court below, not prejudicial to a defendant, is no ground for reversal. *Hampton v. United States*, Morris, 489; *State v. Seamons*, 1 G. Greene, 418; *Mays v. Deaver*, 1 Iowa, 216; *Devine v. State*, 4 Ib., 443; *Speers v. Fortner*, 6 Ib., 553; *Hannon v. Hale*, 7 Ib., 153; *State v. Cooster*, 10 Ib., 453; *State v. Middleton*, 11 Ib., 247; *State v. Kreig*, 13 Ib., 462; *State v. Schilling*, 14 Ib., 455; *State v. Hessenkamp*, 17 Ib., 25; *State v. Baldy*, Ib., 39; *State v. Emeigh*, 18 Ib., 122; *State v. Knight*, 19 Ib., 94; *State v. Thompson*, 19 Ib., 299; *State v. Dicklots*, 19 Ib., 447; *State v. Curney & et al*, 20 Ib., 82; *State v. Neeley*, 20 Ib., 108; *State v. Greisenhaue*, 20 Ib., 228; *State v. Feller*, 25 Ib., 67; *State v. Shehan*, 32 Ib., 88; *State v. King*, 37 Ib., 462.

PRESUMPTION OF ERROR.

Where there has been error a presumption of prejudice arises, and if the record fails to satisfy the court that no prejudice has in fact been caused, then such error cannot be disregarded. This should not be left in serious doubt. *Potter v. The C. R. I. & P. R. Co.*, 46 Iowa, 399.

EVIDENCE.

SECTION 4556. The rules of evidence prescribed in the civil part of this Code, shall apply to criminal proceedings as far as applicable, and as they are not inconsistent with the provisions of this chapter; but nothing contained in this title shall render any person who, in any criminal proceeding, is charged with the commission of any public offense, competent or compellable to give evidence thereon for or against himself.

LAWS OF 1868, CHAPTER 168—EVIDENCE IN CRIMINAL ACTIONS.

AN ACT in Relation to Evidence in Criminal Actions. Amending Sections 3636, and 4421, and Repealing Section 4237, and part of Section 4556 of the Code.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That section 3636, chapter 1, of title 22 of the Code, be amended by adding thereto the following: "Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state; and should a defendant not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state during the trial, refer to the fact that the defendant did not testify in his own behalf; and should he do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial."

SEC. 2. Section 4237 is hereby repealed, and all that part of section 4556 after the word "chapter" in the fourth line, is hereby repealed, which will then read as follows:

SEC. 4556. The rules of evidence prescribed in the civil part of this Code shall apply to criminal proceedings, as far as applicable, and as they are not inconsistent with the provisions of this chapter.

SEC. 4557. In a prosecution against a railway company for obstructing a highway or any private way, proof that any such way is in an unsafe condition, or that it is inconvenient for travel at the place of its intersection with such railway, shall be presumptive evidence that such company has obstructed such way.

SEC. 4559. A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof.

SEC. 4561. A magistrate, in any criminal proceeding before him, may issue subpoenas subscribed by him with his

name of office for witnesses within the state in behalf of either party thereto.

SEC. 4562. The clerk of the court in which any criminal case is pending must, at all times, upon the application of the defendant or his attorney, issue as many blank subpoenas under the seal of the court, subscribed by him, for witnesses within the state, as may be required by the defendant. He must also issue subpoenas, on the part of the state, when required.

SEC. 4563. A peace officer must serve within his town or county, as the case may be, any subpoena delivered to him for service on the part of either the state or defendant, and must make a written return of the service subscribed by him, and state the time and place of service, without delay. A subpoena may, however, be served by any other person.

SEC. 4564. The service of a subpoena must be by delivering a copy and showing the original to the witness personally.

SEC. 4565. If a witness conceal himself to avoid the service of a subpoena, the officer may break open doors or windows for the purpose of making service.

SEC. 4566. Disobedience to a subpoena, or refusal to be sworn, or to answer as a witness, may be punished by the court or magistrate as a contempt.

SEC. 4567. A witness willfully disobeying a subpoena in a criminal case without good cause, shall be liable to the party injured for the amount of the damages sustained by such party.

SEC. 4568. The undertakings of witnesses in criminal cases, may be forfeited and enforced like the undertaking of bail.

SEC. 4569. A subpoena in a criminal case, runs into any part of the state.

SEC. 4570. In cases of impeachment, subpoenas may be issued on behalf of either party by the secretary of the senate.

SEC. 4571. A defendant in a criminal case, either after preliminary information, indictment, or information, may examine witnesses conditionally or on commission, in the same manner and with like effect as in civil actions.

SEC. 4572. A person apprehensive of criminal prosecution, may perpetuate testimony in his favor, in the same manner, and with like effect, as it may be done in apprehension of any civil action.

STATEMENTS OF DECEASED ADMISSIBLE.

In a prosecution for murder committed while the deceased and the prisoner were journeying together, evidence of the statements of the deceased while on the journey as to where they came from and where they were going, though not made

in the presence of the prisoner, are admissible as part of the *res gesta*. *State v. Vincent*, 24 Iowa, 570; 34 Ib., 131.

Where the defense claimed that the body found was not that of the person, the murder of whom the prisoner stood charged, evidence that such person before he left home informed the witness that he intended soon to leave and never make himself known to or be heard from by his family, was held inadmissible. *State v. Vincent*, 24 Ib., 570.

DEPOSITIONS.

Depositions on the part of the prosecution cannot be introduced against a defendant in a criminal cause, but may be introduced on the part of defendant. *State v. Reidel*, 26 Iowa, 430; 7 Sm. & M., 475; *State v. Farrington*, 10 Ohio, 354.

FACTS AFFECTING WEIGHT OF.

Facts affecting the weight of testimony constitute no objection to its admission but are for the jury to determine. *State v. Porter*, 34 Iowa, 131.

REASONABLE DOUBT.

The rule that the prosecution must, in order to convict the prisoner, establish his guilt beyond a reasonable doubt, is limited to cases where the doubt or hypothesis arises out of the evidence introduced, and does not extend to facts which may possibly exist and of which there is no proof. *State v. Porter*, 34 Iowa, 131; *State v. Hayden*, 45 Ib., 11. But such doubt shall be natural and substantial and not forced or fanciful. *State v. Bodekee*, 34 Iowa, 520.

OPINION OF WITNESS—WHEN ADMISSIBLE.

After a witness has stated the facts and circumstances of a transaction within his knowledge, he may then be asked his opinion respecting them. His conclusion based upon previous knowledge and not derived from the immediate facts to which he has testified would be inadmissible. *State v. Mary and Elmira Stickley*, 41 Iowa, 232; in support of *Pelamoures v. Clark*, 9 Ib., 1; *Dunham's Appeal*, 27 Conn., 193. As a general principle of law a non-professional witness cannot give his opinions. 34 N. Y., 190; 36 N. Y., 576; 42 N. Y., 270; 55 N. Y., 634; 1 Gray, Mass., 337; 2 Allen, 511; 47 Maine, 159.

ACCOMPLICE.

A conviction cannot be had on the testimony of an accomplice, unless corroborated by such other evidence as in itself tends to connect the defendant with the commission of the offense. Code of 1873, Sec. 4559; *State v. Moran*, 7 Iowa, 453.

OBJECTIONS, WAIVER OF—PRACTICE.

When, on a criminal trial, improper evidence is admitted without objection, the failure to object waives the error in its admission. *State v. Polson*, 29 Iowa, 133; *State v. Stickley*, 41 Iowa, 232.

EVIDENCE IN AGGRAVATION—AFTER VERDICT.

Whether evidence in aggravation may be introduced after verdict, *quære*. If introduced it is not ground for reversing the judgment and would only be considered by the Supreme Court for the purpose of reducing the penalty if excessive. *State v. Little*, 42 Iowa, 51.

CIRCUMSTANTIAL PROOF.

Where the *act* itself is sought to be established by circumstantial evidence, the proof must exclude every other hypothesis than that of the prisoner's guilt. 1 Greenl. Ev., Sec. 13; *State v. Ostrander*, 13 Iowa, 459; *Com. v. Cobb*, 14 Gray, 57; *State v. Maxwell*, 42 Iowa, 208; *People v. Cunningham*, 6 Park Cr. R., 398.

The contrary of the last above rule is held, where the act is admitted or proved by direct testimony, and the intent with which it is committed is only in question. *State v. Maxwell*, 42 Iowa, 208.

REBUTTING INCOMPETENT EVIDENCE.

Competent evidence may be received on behalf of one party to rebut incompetent evidence introduced by the other party without objection; but incompetent testimony cannot be admitted to rebut incompetent testimony. *McCartney v. Territory of Neb.*, 1 Neb., 121.

THREATS OF DECEASED TOWARD ACCUSED.

Threats of the deceased towards the accused which were made some time after the deceased had received the wound

of which he died, constitute no part of the *res gesta* and is inadmissible. *People v. Caw*, 3 Neb., 357.

CIRCUMSTANTIAL EVIDENCE—TESTIMONY.

Evidence that the ground just where the deceased was struck was covered with stones or pieces of rock, held admissible where the character of the wound on the skull indicated that it could not have been produced with the fist. *People v. Caw*, 3 Neb., 357.

FLIGHT OF PRISONER EVIDENCE OF GUILT.

Flight in a criminal prosecution is one of the most common grounds for a presumption of guilt; and when the flight is connected with the offense charged, and for which the accused is on trial, it is an act that indicates fear, and this fear points to guilt. And a flight is universally admitted as evidence of the guilt of the accused, though it is not conclusive. *Johson v. State*, 17 Ala., 618, 624; *Martin & Flynn v. State*, 28 Ala., 71, 81; *Foxley's Case*, 5 Co., 109; *Burril on Circums. Ev.*, 472; *Murrell v. State*, 46 Ala., 89; 7 Am. R., 592; *State v. James*, 45 Iowa, 412.

STATEMENTS OF EVIDENCE GIVEN BY PRISONER AGAINST ANOTHER.

On a trial of an indictment it is competent for the State to prove, by parol, what the prisoner testified to on a complaint made by him before a magistrate against a third person. *People v. Burns*, 2 Park Cr. R., 34.

ADMISSIBILITY OF EVIDENCE AFTER ARGUMENT IS COMMENCED.

In criminal as well as in civil cases, it is within the discretion of the court to receive further evidence on the part of the prosecution after the summing up has been commenced. *Kalle v. People*, 4 Park. Cr. R., 591; and during any stage of the proceedings. *People v. Jackson*, 2 Wheeler's Cr. C., 253; *Stephens v. People*, 4 Park, Cr. R., 396; *Wilke v. People*, 53 N. Y., 525.

EVIDENCE BEFORE CORONER ADMISSIBLE, WHEN.

When the testimony of a witness before a coroner had been reduced to writing, and corrected and read over to, and subscribed by her, held, that it could be read in evidence to contradict her testimony on the trial, although her attention had

not been called to it during her examination. *People v. McCraney*, 6 Park Cr. R., 49; *Clapp v. Wilson*, 5 Denio, 285.

MOTIVE, WANT OF—EVIDENCE ALWAYS ADMISSIBLE.

In a criminal case, evidence of the existence or want of motive is always admissible. *People v. Robinson*, 1 Park Cr. R., 649; 2 *Ib.*, 235; *McCannor v. People*, 3 *Ib.*, 272; *People v. Wood*, *Ib.*, 681; *Green v. People*, 4 *Ib.*, 380; *Fransend v. People*, 5 *Ib.*, 198; *People v. Cunningham*, 6 *Ib.*, 398.

EVIDENCE—PRESUMPTION AGAINST PRISONER.

No inference can be drawn against the prisoner in a capital case from his omission to explain circumstances calculated to raise a suspicion of guilt, unless it appear that there is evidence which would elucidate the matter in dispute, and that it is peculiarly within the knowledge of the prisoner. *People v. Bodine*, 1 Denio, 281; Edmond's Select Cases, 36; *People v. McWhorter*, 4 Barb., 438; nor from the omission to give evidence of good character. *Ormsby v. People*, 53 N. Y., 472; *Ackley v. People*, 9 Barb., 609; *Donohoe v. People*, 6 Park Cr. R., 120.

TELEGRAMS ADMISSIBLE.

Telegrams may properly be admitted as evidence, as they show the intent of the party. The guilty intent of the party may be shown by his acts, conduct and declarations before, at the time, or after the commission of a criminal act. *State v. Lewis*, 45 Iowa, 20.

PROOF OF OTHER FELONIES NOT IN ISSUE.

Nothing shall be given in evidence which does not directly tend to prove or disprove matter in issue. Proof of one felony committed at a different time, and upon or against another person having no connection with the crime charged, is not admissible. *State v. Walters*, 45 Iowa, 389.

EXAMINATION OF WITNESSES.

IMPROPER QUESTION—NO CAUSE FOR REVERSAL UNLESS PREJUDICIAL TO DEFENDANT.

An improper question is no cause for reversal unless followed by an improper answer and to the prejudice of defend-

ant. *Mays v. Dever*, 1 Iowa, 216; *State v. Groom*, 10 Iowa, 309.

CROSS-EXAMINATION.

For the purpose of eliciting truth, great latitude should be allowed in cross-examination. Its extent rests in the sound discretion of the court. *State v. Porter*, 34 Iowa, 131.

WITNESSES INTRODUCED AFTER DEFENDANT'S EVIDENCE IS CLOSED.

The court has the discretion to permit a witness to be examined and testify in behalf of the State to matters not rebutting in their nature, after the close of defendant's testimony. *State v. Flynn*, 42 Iowa, 164.

SUBSEQUENT STATEMENTS—EXAMINATION.

A witness who, upon direct examination testified only to the fact of discovering the defendant in her house in the night time, could not be asked on cross-examination, if she had not subsequently stated that she did not "*think* defendant intended to steal anything." *State v. Maxwell*, 42 Iowa, 208.

LEADING QUESTIONS.

In the exercise of a sound discretion, leading questions may be permitted by the court. And unless it appears that said discretion has been abused, the action of the court below will not be disturbed. 1 Greenl. Ev. Sec., 435; *State v. Bodekee*, 34 Iowa, 520.

CROSS-EXAMINATION—INTOXICATION OF WITNESSES.

It is always of vital importance to ascertain the exact condition of the mind of a witness at the time of a transaction or conversation about which he is testifying. And if, for any reason, such as imbecility or excessive intoxication, the witness was in such a state of mind as rendered him incapable of exercising a correct discrimination, the court and jury should know it. And it is proper to ask the witness whether he was intoxicated at the time and place testified to. 2 Phil. Ev.; Cow. & Hill & Edw., notes, 950, note, 596; *Burley v. State*, 1 Neb., 385.

EXAMINATION—PARTY NOT BOUND BY ANSWER OF WITNESS.

It is proper to enquire into the motives which influence a witness in giving his testimony, and the party cross-examin-

ing is not bound by his answer, but may contradict him. *People v. Austin*, 1 Park Cr. R., 154.

CROSS-EXAMINATION—SERIES OF TRANSACTIONS.

If a witness has testified to a part of a transaction which implicates the accused, the latter has a right to show by cross-examination of the same witness that the criminality was on the part of the witness and not of the accused. *People v. Carroll*, 3 Park Cr. R., 73.

RECALLING A WITNESS.

The defendant cannot as a matter of right recall a witness. *State v. Ruhl*, 8 Iowa, 449. Nor has the prosecution a right to recall the prosecutrix to contradict the statement made by some other witness, after the evidence has been closed on both sides. Section 2799, of Civil Code, which provides, "At any time before the cause is finally submitted to the court or jury, either party may be permitted by the court to give further testimony to correct an evident oversight or mistake," does not apply to criminal but only to civil cases. Yet under some circumstances in criminal cases, and for some purposes, after the evidence is closed, a witness may be recalled if his evidence has been misunderstood by the court, counsel, or jury. And it is often done when counsel differ as to the evidence given, and the court is unable to determine the precise statements of a witness. *State v. Shean*, 32 Iowa, 93.

SIGNS AND TOKENS.

A witness possessed of the signs and tokens of criminals cannot be compelled to divulge them. *State v. Wilson*, 8 Iowa, 408.

REBUTTAL BY WITNESSES—NOT INDORSED ON INDIOTMENT.

The State in a criminal prosecution may introduce, as rebutting evidence, the testimony of witnesses who were not before the grand jury, whose names are not indorsed upon the indictment, and of whose introduction the defendant has received no notice. *State v. Gillick*, 10 Iowa, 98; *State v. Parish*, 22 Iowa, 284; *Scott v. Woodward*, 2 McCord, 161; *Nelson v. U. S.*, Pet. C. C., 235.

WHAT IS REBUTTING EVIDENCE.

Evidence in corroboration of the testimony given in chief by the prosecuting witness is inadmissible. For all evidence to sustain the charge must be introduced by the prosecution in the first instance. But where the defendant seeks to impeach the character of the prosecuting witnesses and introduces evidence to that effect, it is proper to introduce evidence in rebuttal to sustain the character of said witnesses, or disprove the evidence thus introduced by the defendant. *State v. George*, 8 Iredell 324; *State v. Parish*, 22 Iowa, 284.

MEDICAL EVIDENCE—EXPERTS—MUST STATE FACTS AND NOT CONCLUSIONS.

Where medical experts were called to testify in relation to the change of the human body after death, held, that they must state facts and not their conclusions. *State v. Vincent*, 24 Iowa, 576.

The opinions of medical experts as to the character of the instrument, producing a wound, its probable effect and consequences, are admissible in a prosecution for murder. *State v. Morphey*, 33 Iowa, 270; *State v. Porter*, 34 Iowa, 131.

Upon a question not involving medical skill or science, the opinions of medical men are not admissible as evidence. *Woodin v. People*, 1 Park Cr. R., 464.

CHARACTER.

Good character may be shown to rebut the presumption of guilt arising from circumstantial evidence. *State v. Turner*, 19 Iowa, 149. And it is well settled that a party charged with a crime may give evidence of his good character. *State v. Kabrich*, 39 Iowa, 277; 18 Ala., 720; 11 Am. R., 771; Roscoe's Cr. Ev., 7th ed., 99; *Lowenberg v. People*, 5 Park Cr. R., 414. As is stated in Roscoe's Cr. Ev., 94, "Evidence of character is admissible for the prisoner, who may show by general evidence that his character is such that he is not likely to have committed the offense which is imputed to him." *Coffee v. State*, 1 Texas Court of Appeals R., 548.

AS AGAINST POSITIVE EVIDENCE.

While good character may be shown, yet against facts positively or strongly proven good character cannot avail, if it be

shown that the defendant did the acts; his previous good character is no defense, though it may be considered in making up the mind of the jury as to the defendant's guilt or innocence. *State v. Turner*, 19 Iowa, 149; *State v. Henry*, 5 Jones, N. C., 65; 5 Cushing, 295; *People v. Hamill*, 2 Park Cr. R., 223; *People v. Cole*, 4 Park Cr. R., 35.

Evidence as to good character of defendant is not admissible in cases of misdemeanors, but applies to felonies. 3 E. D. Smith, N. Y., 518.

GOOD CHARACTER WHILE A PRISONER.

Evidence of good conduct of a prisoner while in confinement is not admissible as tending to establish innocence. *State v. Hart*, 29 Iowa, 268.

CHARACTER OF DECEASED.

Evidence of the character of the deceased in relation to his fighting and quarreling, and when this disposition is known to the defendant, is admissible. *State v. Abarr*, 39 Iowa, on page 189; *State v. Field*, 14 Me., 244; *Commonwealth v. Hilliar*, 2 Gray, 294; and in the first case cited the court say, "we are quite clear there was no error in refusing the testimony as to particular acts. *Forshee v. Abrahams*, 2 Iowa, 571; see also *State v. Collins*, 32 Iowa, 36.

STATE CANNOT GO INTO QUESTIONS OF CHARACTER, EXCEPT TO DISPROVE.

It is the settled doctrine of the cases that whenever the defendant, charged with a public offense, chooses to call witnesses to prove his general character to be good, the prosecution may offer testimony to disprove it, but that it is not competent for the prosecution to go into this inquiry, until the defendant has voluntarily put his character in issue. Russell on crimes, 703, 2d ed.; *Commonwealth v. Hardy*, Mass., 302; *Com. v. Webster*, 5 Cushing, 325; *State v. Kabrich*, 39 Iowa, 277.

FAILURE TO GIVE EVIDENCE OF GOOD CHARACTER.

The fact that the defendant does not introduce evidence of good character raises no presumption of guilt against him, and it is erroneous for the court to instruct that the "defendant's failure to introduce evidence of good character may be con-

sidered by them." *State v. Kabrich*, 39 Iowa, 277; *People v. Bodine*, 1 Denio., 281; *State v. O'Neal*, 7 Iredell., 251; *State v. Dockstadder*, 42 Iowa, 436; *People v. White*, 24 Wendell, 520; 6 Park Cr. R., 120. A contrary doctrine was held in *People v. Vane*, 12 Wend., 78, which was overruled in *People v. Bodine*; the same doctrine as in the Vane case was held in *State v. McCallister*, 24 Maine, 139.

PARTICULAR ACTS.

Where the defendant introduces evidence of his good character this permits the State to go into particular acts on cross-examination of the witnesses as introduced by the defendant, and permits the State to ask such witness on cross-examination whether he has not heard of the defendant being guilty of certain acts or charges of a criminal character. *Gordon v. State*, 3 Iowa, 410; *State v. Arnold*, 12 Iowa, on page 487; *Leonard v. Allen*, 11 Cushing, 241; *Rex v. Martin*, 6 C. & P., 562; *Commonwealth v. O'Brien*, 119 Mass., 342; 20 Am. R., 325; while it is said in *Commonwealth v. Hardy*, "It is not competent for the prosecutor to go into this inquiry until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts." 2 Mass., 303, 318; *Commonwealth v. Sacket*, 22 Pick., 394; *Com. v. Webster*, 5 Cushing, 295; *Commonwealth v. O'Brien*, 119 Mass., 342; 20 Am. R., 325.

[IN WHAT CASES EVIDENCE AS TO CHARACTER IS ADMISSIBLE.

It is clearly settled that in all cases of felonies evidence of good character of the defendant is competent, as to whether it applies to *all* cases, "*quere*." *Commonwealth v. Hardy*, 2 Mass., 303. In this last case cited Chief Justice Parsons held that such was admissible in all criminal cases, while Justices Sewall and Parker said they were not prepared to say that testimony of general good character should be admitted in all criminal cases, but clearly of opinion that it might be admitted in capital cases in favor of life. *Fields v. State*, 47 Ala., 603; 11 Am. R., 771; also, see generally, Roscoe's Cr. Ev., page 99, 7th edition. It is held in Iowa that "Evidence of good character is admissible in *all* criminal cases." The importance to be attached to it necessarily varies according to

the varying circumstances of different cases. Its weight must be slight where the accusation of crime is supported by the direct and pointed testimony of credible witnesses; and it will seldom avail to control the mind in cases where the evidence, though circumstantial, is reliable, strong, and clear. But in cases where other evidence is nearly balanced, proof of good character is entitled to great weight. *Ramson v. People*, 43 N. Y.; 6 Wharton's Am. Cr. Law, 293; *State v. Kinley*, 43 Iowa, 294.

NATURE OF THE CHARGE.

When evidence is admitted touching the general character of the defendant, it ought to relate to the particular charge against him where a defendant is on trial for perjury; under this charge the defendant's character for truth and veracity was directly in issue, and evidence not only as to his general character, was admissible, but also of his character for truth and veracity. *State v. Kinley*, 43 Iowa, 294.

TIME LIMITED.

Testimony is competent to prove the good character of the defendant up to the time the indictment was found, but evidence of good character subsequent to that time, is incompetent. *State v. Kinley*, 43 Iowa, 294.

WITNESSES GENERALLY.

In criminal cases witnesses are bound to attend in all courts and in all cases, including justices' courts, without their fees being paid in advance. And this applies to witnesses for the defense as well as for the State, as it is provided in section 4566, Code of 1873. "Disobedience to a subpoena or refusing to be sworn, or to answer as a witness, may be punished by the court or magistrate, as a contempt." For service of subpoenas, and liabilities for failing to appear when properly served, see "Evidence."

SEC. 3814. Witnesses in any court of record shall receive for each day's attendance, one dollar and twenty-five cents;

Before a justice of the peace, fifty cents for each day;

Mileage for actual travel per mile each way, five cents;

An attorney, juror, or officer, who is in habitual attendance on the court for the term at which he is examined as a witness, shall be entitled to but one day's attendance;

Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required;

For attending before the grand or trial jury, or court in criminal cases where the defendant is adjudged not guilty, the fees above provided for attending the district or justice's court shall be paid by the county, upon a certificate of the clerk or justice showing the amount of the services to which they are entitled.

SEC. 3818. In all criminal cases the fees of witnesses for the defense shall be paid by the county.

SEC. 3636. Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, both civil and criminal, except as herein otherwise declared.

SEC. 3637. Facts which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility.

SEC. 3641. The husband nor wife shall in no case be a witness for or against the other, except in a criminal proceeding for a crime committed by one against the other, or in a civil action or proceeding one against the other, but they may, in all civil and criminal cases, be witnesses for each other.

SEC. 3642. Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.

SEC. 3643. No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases, where the party in whose favor the same are made, waives the rights conferred.

SEC. 3646. No witness is excused from answering a question upon the mere ground that he would be thereby subjected to a civil liability.

SEC. 3647. But when the matter sought to be elicited would tend to render him criminally liable, or to expose him to public ignominy, he is not compelled to answer except as provided in the next section.

SEC. 3648. A witness may be interrogated as to his previous conviction for felony. But no other proof of such conviction is competent except the record thereof.

SEC. 3649. The general moral character of a witness may be proved for the purpose of testing his credibility.

SEC. 3678. A person confined in any prison in this State, may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned, and in a criminal case in any county in the State; but in all other cases his examination must be by a deposition.

SEC. 3679. While a prisoner's deposition is being taken, he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the depositions.

A witness once recognized or subpœnaed in a criminal case, is bound to attend until he is discharged by the court, and it is not necessary to again subpœna him, in case there is a continuance or change of venue, in justices and inferior courts. But having once been duly subpœnaed, he is bound to take notice of the orders of the court. Witness may be compelled to testify if in attendance at the trial, though not subpœnaed. But, in the District or superior courts, where the case is continued for the term or a change of venue taken to another county or district, the witnesses must again be subpœnaed.

COMPETENCY—INFANTS.

Infants from seven years old and upwards are generally presumed as being competent to testify. This, however, does not depend so much upon their age as upon their capacity; the question being whether they are capable of distinguishing between right and wrong, and understand the nature of an oath, and are capable of receiving and relating facts truly. If it be necessary to examine a child as to his competency of being a witness, the court should interrogate him as to age, education, and general intelligence; also the consequences of false swearing and the like.

PRISONER NOT COMPETENT IN HIS OWN BEHALF.

A person indicted for a criminal offense is not a competent witness in his own behalf. *State v. Laffer*, 38 Iowa, 422; *State v. Bixby*, 39 Ib., 467; the same applies in Iowa in all

inferior courts except on preliminary examinations, when the Code provides that the defendant may be a witness in his own behalf. But under the law of 1878, chapter 168, a defendant *may* be a witness in his own behalf. See title "Evidence."

WIFE COMPETENT WITNESS FOR HUSBAND.

The wife of a criminal on trial for an offense is a competent witness in his behalf, and entitled to be regarded as other witnesses are, and to stand free and unembarrassed upon her own character, regardless of her relation to the criminal. *State v. Guyer*, 6 Iowa, 263; *State v. Rankin*, 8 Ib., 355.

WITNESS—SELF-CRIMINATION.

A peace officer cannot refuse to answer questions touching his knowledge of the places where liquors are being sold in violation of law, on the ground that under section 1578 of the Revision of 1860, he would criminate himself. When the question involves only facts of recent occurrence the answer cannot criminate the witness. *Hunt v. McCalla, Sheriff, &c.*, 20 Iowa, 20. Nor is a witness justified in refusing to answer questions which cannot, from their nature tend to criminate him, and of such a question he cannot be judge. But where from the nature of the question the answer would unavoidably criminate the witness, he is sole judge and may answer or refuse to answer the question. *United States v. Burr*, 1 Robb., 215; *Richmond v. State*, 2 G. Greene, 532. Except where a defendant becomes a witness under a statute providing he may, at his request, and does so, he waives his constitutional rights as to criminating himself, and may be cross-examined as to every thing relevant to the issue. *Com. v. Nichols*, 114 Mass., 285; 19 Am. R., 346; 11 Cush., 437; 18 Gray, 472; 13 Allen, 563; 97 Mass., 545; 104 Mass., 234; 28 Conn., 309.

FEES—EXPERTS.

Physicians or other professional men who may have been summoned as witnesses are not entitled to extra compensation under Sec. 3814 of the Code of 1873, unless called to testify as experts and give an opinion based upon their special study and experience. *Snyder v. Iowa City*, 40 Iowa, 646.

ONE CO-DEFENDANT A COMPETENT WITNESS FOR THE OTHERS.

Under the common law, one defendant on trial on an indictment cannot be called as a witness by his co-defendant, unless acquitted, or convicted, but not rendered infamous, and this even though they are tried separately. And upon this doctrine the case of the *State v. Nash and Redout*, 7 Iowa, 383, was decided. Yet some of the common law authorities hold otherwise. *Moffett v. State*, 2 Humph., 99; *United States v. Henry*, 4 Wash. C. C. R., 228; *Garret v. State*, 6 Mo., 1; *Blannerhasset v. State*, 1 Walker Miss., 7. However, this case in 7 Iowa is overruled, and the common law rule changed so that by section 2388, Code of 1851, which is like section 3636, Code of 1873, and Sec. 4, Article 1, Iowa Constitution, it is held that one defendant may be introduced as a witness for his co-defendant. *State v. Nash*, 10 Iowa, 81. And this rule applies also where two or more co-defendants are jointly tried. *State v. Gigher et al.*, 23 Iowa, 318; *State v. Erwin and Erwin*, 44 Iowa, 637.

HUSBAND AND WIFE.

A wife who is jointly indicted and on trial with her husband, may be a witness for her husband with the restriction that her testimony should not be considered in her own behalf. *State v. Donovan*, 41 Iowa, 587. The wife is also a competent witness for her husband where she is not jointly indicted, and the same rule applies to her as to other witnesses. *State v. Bernard*, 45 Iowa, 234. Under the law of 1878 she can also testify in her own behalf without any restriction as to her evidence.

PRIVILEGED COMMUNICATION—HUSBAND AND WIFE.

Under section 328, of the Criminal Code of Nebraska, it is provided that "neither husband nor wife shall be competent to testify concerning any communication made by one to the other during marriage," which is substantially the same as the Iowa Code of 1873, Sec. 3642, page 684, which under Sec. 4536, page 666, applies to criminal as well as civil proceedings. It was held where the defendant was on trial for larceny, a letter sent by him while in prison to his wife containing some facts in relation to the stolen property was admissible, and is not to be excluded on the ground of privileged communication

between husband and wife—the court saying: “Where, however, papers or letters are offered in evidence on the trial of a cause, which are pertinent to the issue, they should be admitted, and the court will not take notice how they are obtained, nor will it form a collateral issue to determine that question.” *Leggett v. Tollering*, 14 East., 302; *Jordan v. Lewis*, Ib., 306; *Commonwealth v. Dana*, 2 Met., 337; *Geiger v. State*, 6 Nebraska, 545.

As to the effect and weight of the wife’s evidence, see “Instructions,” title, “Trial of an Issue of Fact in an Indictment.”

OBJECTIONS, WHEN TO BE MADE—INCOMPETENCY.

An objection to a witness founded on the previous conviction of crime, must be made at the trial and when the witness is offered to be sworn. *Commonwealth v. Green*, 17 Mass., 538; 1 Gr. Ev., Sec. 372, 10th ed. But under Secs. 3636 and 3637, Iowa Code of 1873, as well as in many other States, a witness is not disqualified from testifying for the reason that he has been convicted of a felony. Such only goes to his credibility.

IMPEACHMENT OF WITNESSES, MODE OF.

The general character and standing of a witness as a good or bad man, without reference to his character for truth, is not admissible for the purpose of impeaching him. *Carter v. Cavanaugh*, 1 G. Greene, 171. While it was held in *Commonwealth v. Murphy*, 14 Mass., 387, that a witness might be impeached by showing her to be a common prostitute, this principle was distinctly overruled in *Commonwealth v. Moore*, 3 Pick., 194; *Jackson v. Lewis*, 13 Johnston, 504; *Gilchrist v. McKee*, 4 Watts, 380; *Wilds v. Blanchard*, 7 Verm., 141; *Bakeman v. Rose*, 14 Wendall, 105; *Spears v. Forrest*, 15 Verm., 435; 1 Starkie’s Ev., 182; *State v. Sater*, 8 Iowa, 420. The question of chasteness or proof of previous offenses, or facts of any nature, are not admissible for the purpose of impeachment. See *Barton v. Morphis*, 2 Dev., N. C., 520; *Walker v. State*, 6 Blackf., 1; *Riley v. Bayse*, 4 Leighs, Va., 330; *U. S. v. Brockens*, 3 Wash. C. C., 99; *Clark v. Hill*, 2 Har. & McHen. M. D., 378; *Cole v. Cole*, Har. & J. M. D., 572. Except in cases of rape and seduction the character of unchas-

tity may be shown. *U. S. v. Vansickle*, 2 McLean, 223. For further authorities as to character for chastity, see "Rape," subdivision "Chastity." Particular facts of the commission of crimes cannot be set out in an affidavit for continuance, for the purpose of impeachment (*State v. Sater*, 8 Iowa, 424), while it is no doubt proper to set out in such affidavit that affiant expects to impeach the witness' character for truth and veracity.

STATE CANNOT IMPEACH WITNESS NAMED IN AFFIDAVIT FOR CONTINUANCE.

Where the defendant filed his affidavit for continuance, and the prosecutor admitted that the absent witness, if present, would swear to the facts stated in the affidavit, such witness cannot be impeached. The rule that the proper foundation must be laid before a witness can be impeached, by proving his statements out of court, applies to this class of cases; and equally to criminal as well as civil trials. Nor would the rule lose its application if the statements out of court were made under oath. *State v. Shannehan*, 22 Iowa, 435.

DEPOSITIONS.

When two different depositions of the same witness have been taken in the same cause, the first one taken cannot be introduced for the purpose of impeaching the second when no foundation was laid in the second by calling the attention of the witness, when such second deposition was taken, to the statements made in the first, for the purpose of affording him an opportunity to confirm or explain the same. The same rule applies to depositions as to other cases. *Glenn v. Carson*, 3 G. Greene, 529; *State v. Ruhl*, 8 Iowa, 447; *Samuels v. Griffith*, 13 Iowa, 103; *Morrison v. Myers & Turner*, 11 Iowa, 538; *Strunk v. Ochiltree*, 15 Iowa, 179; *State v. Collins*, 32 Iowa, 41.

CONTRADICTORY STATEMENTS.

Where the credibility of a witness is sought to be impeached by proof of his having made, or testified to, statements elsewhere, different from, and conflicting with his testimony, evidence that he made statements long before the trial corresponding with his testimony, is not admissible for

the purpose of supporting him. *State v. Vincent*, 24 Iowa, 570; *People v. Finnegan*, 1 Park Cr. R., 147. But if a witness is charged with a design to misrepresent, on account of his changed relation to the cause, evidence that he made like statements before said change of relation, is admissible. So, if it is attempted to be shown that his evidence is a recent fabrication, or where long silence concerning an injury is construed against the injured party, it may be shown that he made similar statements soon after the transaction in question. *State v. Vincent*, 24 Iowa, 570; 1 Starkie's Ev., 187; 1 Greenl. Ev., Sec. 469; *Gibbs v. Linsley*, 13 Ver., 208; *Reed v. Spaulding*, 42 N. H., 114; *Smith v. Stickney*, 17 Barb., 489.

STATE MAY INTRODUCE WITNESSES TO IMPEACH DEFENDANT'S IMPEACHING WITNESSES.

Where the defendant introduces witnesses to impeach the prosecutor's witnesses, the State may, in turn, introduce witnesses to impeach defendant's impeaching witnesses. At all events, objections to the admissibility of said evidence should be made at the time it is offered. *State v. Moore*, 25 Iowa, 129.

DECLARATION OF PARTY NOT OF RECORD.

The declaration of one not a party to the record, is admissible only for the purpose of impeachment, and before such declaration can be introduced, the attention of the witness must be directed to the time, place, and circumstances of the supposed contradiction. 1 Greenleaf on Ev. Sec., 462; *State v. Hamilton*, 32 Iowa, 572.

MINUTES OF MAGISTRATE ON PRELIMINARY EXAMINATION NOT ADMISSIBLE ON TRIAL, WHEN.

Minutes of the evidence taken by an examining magistrate are not admissible as evidence against the defendant for the purpose of impeachment, especially so, when his attention has not been called to the statements made before the justice at the time it was taken. *State v. Collins*, 32 Iowa, 41; *State v. Hayden*, 45 Iowa, 45.

IMMATERIAL MATTER.

A witness cannot be impeached upon an immaterial matter. *State v. Maxwell*, 42 Iowa, 208.

INTERPRETER.

Where the defendant made a statement to A., through an interpreter, A. could not afterwards be called to give his evidence as to the statements made to him for the purpose of impeachment. But the same must be done by the interpreter. *State v. Noyes*, 36 Conn., 80; 4 Am. R., 37.

EVIDENCE IN SUPPORT OF IMPEACHED WITNESS.

Where the character for truth and veracity of a witness has been impeached, a person well acquainted with the witness in the community in which he lives, but who has never heard the character of the witness as to veracity called in question or spoken of is, nevertheless, competent to testify in favor of the witness. *State v. Lemons*, 4 W. Va., 755; 6 Am. R., 293; *Buckie v. State*, 20 O., 18.

VOLUNTARY CONFESSIONS.

The rule that a witness is not bound to criminate himself is well established; but a witness may waive this privilege, and if he consents to testify to any other matter, tending to criminate himself, he must testify fully, in all respects, relative to that matter material to the issue. *State v. Fay*, 43 Iowa, 651.

WITNESSES—LUNATICS COMPETENT.

The fact that a person is a lunatic does not *per se* exclude him as a witness, but he is competent if, at the time of his examination, he has that share of understanding which is necessary to enable him to retain in memory the events of which he has been a witness, and to give him a knowledge of right and wrong, and of such competency the court is judge. *Coleman v. Commonwealth*, 25 Gratt., 865; 18 Am. R., 711.

BOUND OVER FOR THEIR APPEARANCE.

Where a case is continued in the District Court witnesses cannot be compelled to give bonds for their appearance, as there is no statute provision to that effect, while an examining magistrate has that power. *State v. Lane*, 11 Kansas, 458.

PERMISSION OF DEFENDANT TO BE A WITNESS IN HIS OWN BEHALF UNDER SOME STATUTES

Where a defendant declines to testify in his own behalf

though allowed at his option, the prosecutor in his argument should not refer to such refusal. *People v. Tyler*, 8 Am. Law Register, 430; Laws of Iowa 1878, Chapter 168. It is said by Lord Hale, that when the prisoner freely tells the facts and demands the opinion of the court whether it be felony, though upon the fact thus shown it appears to be felony, the court will not record his confession, but admit him to the felony not guilty. 2 Hale P. C., 225. A plenary judicial confession is in other words a plea of guilty. *Ib.*

GENERALLY.

Confessions to be admissible against a prisoner must be voluntary, that is, neither obtained by the application of hope, on the one hand, or fear on the other. *State v. Knight*, 19 Iowa, 94. When it is shown that a public offense has been committed, free and voluntary confession of guilt or of facts necessarily tending to show his guilt by the party accused, are by the law presumed to be true and are entitled to the highest credit and greatest weight as evidence of such fact or facts. *State v. Brown*, Western Jurist, July No., 1878, page 426; *Duffy v. The People*, 5 Park Cr. R., 321; *Barnes v. State*, 36 Texas, 356; 1 Green's Cr. R., 648; *State v. Fields*, Peck's R., 140; *McGlothlin v. State*, 2 Cold., Tenn., 223; *Whitsides v. State*, 4 Cold., Tenn., 175; *Deathridge v. State*, 1 Sneed., 75; *Wilson v. State*, 3 Heiskell, 232; 1 Green's Cr. R., 582; *State v. Phelps*, 11 Vt., 116; *State v. Grant*, 9 Shelby, 171; *Ward v. People*, 3 Hill, 395; *State v. Freeman*, 1 Speers, 57; *Boyd v. State*, 2 Hum., 37; *State v. Harman*, 3 Harrington, 567.

EXCEPTION TO GENERAL RULE.

Though a confession be not voluntary, and therefore inadmissible, yet if any fact is stated, as that the weapon used, or property stolen, may be found in a particular place and is so found, this may be proven against the prisoner. *Warrichalls Case*, 1 Leach, 264; *Reg. v. Gould*, 38 Eng. C. L., 9, C. & P., 364; *State v. Knight*, 19 Iowa, 102; 1 Greenleaf Ev., 229, 231, 232; *Duffy v. The People*, 26 N. Y., 588; *Gates v. People*, 14 Ills., 433; 2 East P. C., 16, S., 94; *Commonwealth v. Kemp*, 9 Pick, 511; *Duffy v. The People*, 5 Park Cr. R., 321.

WHEN MADE OUT OF COURT, CORROBORATION.

A confession made out of court will not warrant a conviction, unless there is other proof that the offense charged has in fact been committed. Thus in case of murder, it must be shown by proof *aliunde* that the alleged subject of the homicide is dead; and so of all other offenses, that a crime has been committed. *State v. Turner*, 19 Iowa, 144; *State v. Jones*, 33 Ib., 10. Again it is said, confessions will not warrant a conviction unless they are accompanied by other evidence that the crime has been committed. *State v. Brown*, Western Jurist, July No., 1878, page 426. (This of course applies to confessions made out of court.)

VERBAL CONFESSIONS.

Verbal confessions of guilt, uncorroborated by circumstances, are to be received with caution. *State v. Wilson*, 8 Iowa, 412.

EXTRA JUDICIAL CONFESSIONS.

Extra judicial confessions when testified to by but one witness, uncorroborated by circumstances, are to be received with caution. *State v. Wilson*, 8 Iowa, 412.

LANGUAGE CONSTITUTING A CONFESSION—DEFINITION.

A confession according to Webster is "the acknowledgment of a crime or fraud." Bouvier defines it to be "the voluntary declaration, made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in the same." 1 Bouvier Law Dic., 266. It was held in case of the *State v. Jones*, where the defendant was on trial for larceny, and at the time of the defendant's arrest and on his way to Des Moines with an officer, the defendant should have used this language to his associate who was arrested at the same time, "they would not have any trouble when they got back to Des Moines. That they would soon get out of this scrape, and both saying they were good shots and could shoot anything any distance, and the other prisoner remarked that if they had any show they could not have taken them;" also the defendant should have said, "that when he tried to escape he could have got away by shooting a man," to which the defendant's associate replied "I would

have done it." This was considered not to be a confession and should not have been regarded as such by the court, but merely furnished evidence to be considered by the jury in arriving at the general verdict. *State v. Jones*, 33 Iowa, 10.

OBTAINED THROUGH PROMISE OR FEAR—COURT TO DETERMINE.

Where it is sought to introduce a witness to prove the confession of the crime made by the defendant, it is proper for the defendant to first examine the witness as to promises or inducements held out to the defendant under the influence of which the confession was made. And whether confessions proved to be introduced in evidence against a prisoner are of the character just indicated, is a question to be determined by the court, and it is therefore the duty of the court to receive preliminary evidence upon the competency of confessions under this rule, and determine the question of their admissibility. *State v. Fidment*, 35 Iowa, 541; *Harting v. The People*, 4 Park Cr. R., 319.

INVOLUNTARY CONFESSIONS.

In order to exclude the confession as involuntary, there must be some promises or inducements made, or some injury threatened, and the material inquiry is, whether the confession has been obtained by the influence of hope or fear, applied by a third person to the person's mind. *State v. Fortner*, 43 Iowa, 494; *State v. Grant*, 22 Maine, 171; *People v. Rankin*, 2 Wheeler's Cr. Cases, 467; *People v. Johnson*, Ib., 378.

MADE WHILE UNDER ARREST.

Evidence of confession should not be excluded on the sole ground that it was made while under arrest. *Hartung v. The People*, 4 Park Cr. R., 319.

MADE TO AN OFFICER.

Confessions made to an officer without any fear, hope or threats, though made when the defendant was excited, is admissible. *People v. Thomas*, 3 Park Cr. R., 256.

STATEMENTS MADE WHILE UNDER OATH.

It is held that where a party before a coroner's jury or other tribunal, is examined as a witness and afterwards indicted, it is proper to introduce evidence of the parties confession or

evidence given at that time. *People v. Hendrickson*, 1 Park Cr. R., 406; also, see 4 Carr. & P., 254; 5 Carr & P., 530; *Rex v. Gilham*, 1 Moody's Cr. Cases, 203; 2 Ib., 45. Contrary, *People v. McMahon*, 15 N. Y., 387.

PRESUMPTION OF FEAR OR HOPE.

When confessions once made under fear or hope are repeated it is presumed that subsequent confessions are made under the same influence, and the burden is upon the prosecutor to show that it is not so made. *Deathridge v. State*, 1 Sneed., 75; *State v. Roberts*, 1 Dev., 259; *State v. Gregory*, 5 Jones, N. C., 315; *State v. Scates*, 5 Ib., 420.

DOUBT AS TO THE LEGALITY OF EVIDENCE.

Where there is a doubt as to the legality of the manner of obtaining a confession of guilt, and there be other evidence ample to support the conviction, there will be no reversal on account of the confession. *Simpson v. State*, 4 Humphrey, 456; 1 Green. Cr. R., 588. When no promises are made or threats used to obtain confessions they shall not be excluded because the circumstances surrounding the defendant were threatening. *Rice v. State*, 47 Ala., 38; 1 Green. Cr. R., 708.

MADE UNDER ADVICE OF FRIENDS.

A confession made on the advice of friends is admissible in evidence. *Young v. Commonwealth*, 8 Bush., 366; 1 Green. Cr. R., 710.

UNDER PROMISE TO NOT FURTHER PROSECUTE.

A confession made under a promise that the prosecutor would not further prosecute is inadmissible. *Boyd v. State*, 2 Humphrey, 39; *Bryant v. State*, Ib., 635.

As to authorities generally, see Roscoe's Crim. Evidence, 7th edition, 38.

DYING DECLARATIONS.

Evidence of this kind, which is peculiar to the case of homicide, has been considered by some to be admissible from necessity, since it often happens that there is no third person present to be an eye-witness to the fact, and the usual witness in other felonies. 1 East. P. C., 353. But it is said by Eyre, C. B., that the general principle upon which evidence of this

kind is admitted is, that it is of declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court. *Rex v. Woodcock*, 1 Leach, 502; *Rex v. Bernadotti*, 11 Cox C. C., 316; Roscoe's Cr. Ev., 7th edition, 30. And evidently is without any hopes of recovery. *Dixon v. State*, 13 Fla., 636; 1 Green. Cr. R., 687. It is the province of the court to determine the competency of what is offered as dying declarations. *State v. Elliott*, 45 Iowa, 486.

DECLARATIONS IN PART.

Where it appears that a deceased said all that he desired to say but did not give a complete narrative of all that occurred, this constitutes no objection to the competency or sufficiency of the dying declarations. 1 Greenl. Ev., Secs. 159, 161; *Vass v. Commonwealth*, 3 Leigh, Va., 786; *State v. Nettlebush*, 20 Iowa, 258; *State v. Patterson*, 45 Vt., 308; 12 Am. R., 200; 1 Green. Cr. R., 490.

WHEN INCOMPETENT.

When the declarations are incomplete by reason of death intervening, or temporary inability suspends their utterance, which is never renewed, or where he is interrupted by the entrance into the declarant's presence of some person to whom he does not wish to make the declaration and therefore stops to wait the withdrawal of such person, but fails afterwards to complete it, in such cases the dying declarations cannot be received as evidence. *State v. Nettlebush*, 20 Iowa, 260. Nor could proof that the deceased was a materialist be received to affect the admissibility of a party's dying declarations. *State v. Elliott*, 45 Iowa, 486.

WEIGHT AND CREDIT OF DECLARATIONS.

Dying declarations introduced in evidence are to be considered by the jury like all other evidence, and must be considered as standing in the same situation as if he were sworn, and to be received with the same degree of credit as the testi-

mony of the deceased would have been had he been examined on oath. *McDaniel v. State*, 8 S. & M., 401; *Green v. State*, 13 Mo., 382; *State v. Nash & Redout*, 7 Iowa, 383. All the circumstances connected with making of the declaration should be admitted to show its credibility. *Hurd v. People*, 25 Mich., 405.

WRITTEN, VERBAL INTRODUCTION OF.

If the only evidence of what the deceased stated was reduced to writing, and signed by him at the time it was made, then the writing, if existing, should be produced; and neither a copy or parol evidence of such declarations could be admitted to supply the omission. And if the writing and the oral statements were the same, then the absence of the writing should be accounted for before evidence of the oral statements could be produced. If, however, the declarations were repeated at different times, and one of them should be reduced to writing, covering different ground and referring to different matters from those comprised in the verbal statements, then both may be introduced. *State v. Tweedy*, 11 Iowa, 351.

AN ANTE-MORTEM STATEMENT NOT READ TO DECEASED INADMISSIBLE.

Declarations not read or signed by the party making them cannot be introduced as evidence. *State v. Fraunburg*, 40 Iowa, 555.

WRITTEN STATEMENTS THE BEST EVIDENCE.

Where dying declarations are at the time reduced to writing and signed by the party making them, the writing is the best, if not the only, evidence admissible. *Butz v. The State*, 1 Meigs, 106; *Rex v. Gray*, 7 Carr & Paine, 230; *State v. Fraunburg*, 40 Iowa, 555.

CIRCUMSTANCES AND CONDITION OF PARTY MAKING THE DECLARATIONS.

The fact that the deceased made his statements in intervals between vomitings does not touch the question of the competency of the evidence, unless it should appear that by such vomitings he was prevented from expressing his meaning in relation to the facts that he was undertaking to state. *State v. Patterson*, 45 Vt., 308; 12 Am. R., 200.

PRISONER HAS THE SAME RIGHT TO RELY ON THE DECLARATIONS AS THE STATE.

See 25 Mich., 405; and, generally, Roscoe's Cr. Ev., 7th edition, page 30, and authorities cited.

DECLARATIONS GENERALLY.

In all cases, civil and criminal, where evidence of an act done by a party is admissible, his declarations, made at the time, having a tendency to elucidate, explain or give character to the act, are also admissible. *Hamilton v. State*, 36 Indiana, 280; 10 Am. R., 22; *Sessions v. Little*, 9 N. H., 271; *Russell v. Frisbie*, 19 Conn., 206; 9 Ala., 382; *Elkins v. Hamilton*, 20 Vt., 627.

PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

Where the defendant came into the office of M. & S. and made threats to kill Dr. H. in the presence of a lawyer employed by them on a salary, it was held that such statements are not privileged communications, as given to professional advisers, as it was not on the subject of professional business at the time it was made. *State v. Mewhirter*, 46 Iowa, 88.

If made to an attorney by a party under an impression that such attorney had consented or agreed to act as attorney of such party, such communication would be privileged, although the attorney himself may not have so understood the agreement. But to make the communication a privileged one, either in that case, or where the relation of attorney and client exists, it must have been made to the attorney by the party as his legal adviser, and for the purpose of obtaining his legal advice and opinion to some legal right or obligation. *Alderman v. People*, 4 Mich., 422.

A party taking the stand in his own behalf may be cross-examined in relation to a communication between himself and his counsel, as to which the latter would not be allowed to testify. *Woburn v. Henshaw*, 101 Mass., 193; 3 Am. R., 333; *Com. v. Nichols*, 114 Mass., 285; 19 Am. R., 346.

TELEGRAPH OPERATORS.

Operators are bound to testify to the contents of a message, if it be material. *State v. Litchfield*, 10 Am. Law Reg., 376.

LAWS OF OTHER STATES, HOW PROVEN.

By section 3718, Code of Iowa, 1873, it is provided, "printed copies of the statute laws of this or any other of the United States, or of Congress, or of any foreign government, purporting or proved to have been published under the authority thereof, or proved to be commonly admitted as evidence of the existing laws in the courts of such State or government, shall be admitted in the courts of this State as presumptive evidence of such laws; to the same effect is Sec. 5935, Comp. Laws of Michigan. These laws are generally sustained. *People v. Colder*, 30 Michigan, 86. The same rule is laid down in New Hampshire without the aid of a Statute. *Emery v. Berry*, 8 Fos., 473. Where a statute appears to be published by authority of a State as its statute laws, it should be admitted as evidence. *People v. Lambert*, 5 Mich., 349; *Merrfield v. Robbins*, 8 Gray, 150; *Town of Woodstock v. Hooker*, 6 Conn., 85; 15 Conn., 539; 8 Fos. N. H., 473.

TURNING STATES EVIDENCE.

Where the prisoner and one B. were jointly indicted on a charge of burglary, the district attorney, with the concurrence of the district judge, entered a *nolle prosequi* as to A., upon an agreement between him and the district attorney that A. should regularly attend court and testify as a witness for the State on the trial of B. At the succeeding term A. was again indicted for the same offense; to this indictment he pleaded the agreement, both in abatement and in bar; which plea was stricken out on demurrer, and he was convicted. It was held that A. should not have been tried on the subsequent indictment so long as the agreement between him and the State was subsisting, and he alone prevented from a specific performance of his part by the want of an opportunity to do so. *Bowden v. State*, 1 Texas Court of Appeals R., 137. It is said to uphold such an agreement tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate. *The People v. Whipple*, 9 Cow., 707; 1 Chitty's Cr. Law, 82, 603, 769; 1 Leach, 118, 120. If the State desires to call one of the defendants indicted it must first discharge him of

record, as by the entry of a *nolle prosequi*. 1 Greenl. on Ev., Sec. 363. And if an accomplice, having made a private confession upon a promise of pardon made by the attorney general, should afterwards refuse to testify, he may be convicted upon the evidence of that confession. 1 Greenl. on Ev., Sec. 379. If the attorney general, of his own authority and upon his official responsibility, gives the pledge of the government that the States' witness shall not be prosecuted if he makes and testifies to a full disclosure of all matters in his knowledge against his accomplices, such pledge on part of the government should be faithfully carried out. In England, as well as in Massachusetts, those who are admitted as witnesses for the government may rest assured of their lives if they perform their engagements. *Commonwealth v. Knapp*, 10 Pick., 478. Where the accomplice performed the conditions on which he was admitted as a witness, although he failed to produce the conviction of his associates, he was nevertheless entitled to a recommendation for pardon. *King v. Rudd*, Cowp., 331. The government is bound in honor, under the circumstances (referring to the agreement), to carry out the understanding or arrangement by which the witness testified, and admitted in so doing his own turpitude. Public policy and the great ends of justice require this of the court. *United States v. Lee*, 4 McLean, 103. It seems to have become a practice, recognized as correct in our own courts (Texas) for the district attorney, with the concurrence of the court, to enter a *nolle prosequi* in cases where it was deemed essential to the ends of justice that one or more of the defendants, by his consent or at his instance, should turn state's evidence against his co-defendant. *Garrett v. State*, 41 Texas, 530; *Barrara v. State*, 42 Texas, 260; *Wright v. State*, 43 Texas, 170; *Johnson v. State*, 33 Texas, 570.

EXECUTION.

SECTION 4512. When a judgment of imprisonment, either in the penitentiary or county jail is pronounced, a certified copy of the entry thereof in the record book, must be forthwith furnished to the officer whose duty it is to execute the same, who shall proceed and execute it accordingly, and no other warrant or authority is necessary to justify or require its execution.

SEC. 4513. If the judgment be imprisonment, or a fine and imprisonment until it be satisfied, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with, or the defendant discharged by due course of law.

SEC. 4514. When the judgment is imprisonment in the county jail of the county in which the trial is had, or a fine, and that the defendant be imprisoned in such county jail until it be satisfied, the judgment must be executed by the sheriff of that county. In all other cases, when the judgment is imprisonment, the sheriff of the county in which the trial was had, must deliver the defendant to the proper officer in execution of the judgment.

SEC. 4515. If the judgment be imprisonment, or a fine and imprisonment until it be satisfied, in the county jail of the county in which the trial was had, the sheriff of the county in which the trial was had shall deliver a certified copy of the entry of the judgment, together with the body of the defendant, to the keeper of the jail or prison in which the defendant is to be imprisoned, and take his receipt therefor on a duplicate copy of such entry, which he must forthwith return to the clerk of the court in which the judgment was rendered, with his return thereon.

SEC. 4516. The sheriff, or his deputy, while conveying the defendant to the proper prison, has the same authority to require the assistance of any citizen of the State in securing the defendant, and retaking him if he escape, as if the sheriff were in his own county; and every person who neglects or refuses to assist the sheriff when so required shall be punishable as if the sheriff were in his own county.

SEC. 4517. An officer executing a judgment of imprisonment shall make a written return of the execution of such judgment forthwith after such execution, and file the same with the clerk of the court, by which the judgment was rendered.

SEC. 4518. Upon a judgment for a fine, a writ of execution may be issued as upon a judgment in a civil case.

SEC. 4519. When the judgment is for the abatement or removal of a nuisance, or for anything other than the payment of money by the defendant, a certified copy of the entry of such judgment, delivered to the sheriff of the proper county, shall authorize and require him to execute such judgment, and he shall return the same with his doings under the same thereon indorsed to the clerk of the court in which the judgment was rendered within seventy days after the date of the certificate of such certified copy, unless it be a judgment of imprisonment, which is hereinbefore provided for.

FINDING AND PRESENTMENT OF INDICTMENT.

SECTION 4291. An indictment cannot be found without the concurrence of twelve grand jurors; and when so found it must be indorsed "A true bill," and the indorsement must be signed by the foreman of the grand jury.

SEC. 4292. When an indictment is found at the instance of a private prosecutor, the following must be added to the indorsement required by the preceding section, "found at the instance of" (here state the name of the person), and in such case, if the prosecution fails, the court trying the cause may award costs against the private prosecutor, if satisfied, from all the circumstances, that the prosecution was malicious or without probable cause.

SEC. 4293. When an indictment is found, the names of all the witnesses examined before the grand jury in that case must be indorsed thereon before it is presented to the court, and the minutes of the evidence of each witness examined before the grand jury, taken by the clerk of the grand jury, must be presented with the indictment to the court, and filed by the clerk of the court, and remain in his office as a record; but the minutes of the evidence shall not be open to the inspection of any person except the judge of the court, the district attorney or his clerk, the defendant and his counsel, or the clerk of such counsel, and the clerk of the court must, within two days after demand made, furnish the defendant or his counsel a copy thereof without charge, or permit the defendant's counsel, or the clerk of such counsel, to take a copy.

SEC. 4294. The indictment, when found and indorsed as prescribed by this chapter, must be presented by the foreman, in the presence of the grand jury, to the court, and marked "filed" by the clerk of the court, and remain in his office as a record.

INDORSEMENT OF INDICTMENT—DISCREPANCY IN FOREMAN'S NAME.

Where James T. Thornburg was appointed foreman, and returned a bill signed J. T. Thornburg, *held* that the error was not fatal to the indictment. *State v. Groome*, 10 Iowa, 309.

AFFIDAVITS TO IMPEACH THEIR FINDING IS INADMISSIBLE.

It is well settled by numerous decisions of the Iowa Supreme Court that affidavits of petit jurors cannot be received to impeach their verdicts by showing any matter which essentially inheres therein, such as that the juror did not assent to the ver-

dict, etc. *Wright v. The Ill. & Miss. Tel. Co.*, 20 Iowa, 195, and cases cited. The same would apply with equal, if not greater force for refusing to hear a grand juror, after coming into open court with an indictment against a defendant, to say that he did not vote for the indictment. *State v. Gibbs*, 39 Iowa, 319.

GRAND JURORS INCOMPETENT TO CONTRADICT THEIR FINDING.

After an indictment has been presented to the court by the grand jury, filed and become a part of the record, it is not competent for those who found the indictment to testify that they did not vote to find the bill, or explain how they did vote or what they intended to find. *State v. Davis*, 41 Iowa, 311.

PRESENTING AND FILING INDICTMENT AFTER ADJOURNMENT OF COURT.

The fact that an indictment was presented and filed after the adjournment of court, cannot be established by affidavits. The regularity of the proceedings of the court below will be presumed. *State v. Gibbs*, 39 Iowa, 319. See, generally, "Indictments."

COSTS TAXED TO PRIVATE PROSECUTOR.

Under the laws of 1858, Chap. 25; Rev., 1860, Sec. 4646; Code, 1873, Sec. 4292, Chap. 15, the District Court has authority, upon the failure to find an indictment by the grand jury, to tax the costs then accrued to the prosecuting witness, when it is shown to the satisfaction of the court that the prosecution was instituted without probable cause. *State v. Donnell*, 11 Iowa, 452. The same rule applies as to misdemeanors. *State in re Frenchard*, 16 Iowa, 53; and for this purpose the party filing the information is considered the prosecuting witness.

FORFEITURE OF THE UNDERTAKING OF BAIL, OR DEPOSIT OF MONEY.

SECTION 4596. If the defendant fail to appear for arraignment, trial, or judgment, or at any other time when his personal appearance in court may be lawfully required, or to surrender himself in execution of the judgment, the court

must direct an entry of such failure to be made on the record, and the undertaking of his bail, or the money deposited instead of bail, as the case may be, is thereupon forfeited.

SEC. 4597. If, before the final adjournment of the court for the term, the defendant appear and satisfactorily excuse his failure, the court may direct an entry to be made on the record that the forfeiture of the undertaking or deposit be discharged.

SEC. 4598. If the forfeiture is not discharged the district attorney may, at any time after the adjournment of the court for the term, proceed by civil action only upon the undertaking of the bail.

SEC. 4599. The action on the undertaking must be in the court in which the defendant was, or would have been required to appear by the undertaking; *provided*, that when the undertaking requires the defendant to appear before a justice of the peace or a court of limited jurisdiction, or before an examining magistrate, it shall be the duty of said justice, or court, or examining magistrate, upon the forfeiture of the undertaking, and within thirty days thereafter, to file the same, together with a copy of all his official entries in relation thereto, in the office of the clerk of the District Court of the county; and thereupon it shall be the duty of the district attorney to proceed to collect the same by a civil action in the District Court of said county, or any other court of said county, having jurisdiction equal to the penalty of said bond.

SEC. 4600. If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, in its discretion, remit the whole or any part of the sum specified in the undertaking.

DISCHARGE OF SURETY ON SURRENDER OF DEFENDANT.

Under Sec. 4994, Rev., 1860, which is the same as Sec. 4600, Code of 1873, the court has a discretion to relieve the surety from a forfeited obligation. If there has been no delay and no prejudice thereby, or if the State witnesses can still be had, and the surety has been vigilant and actually produced the principal, the court will, and ordinarily should, discharge the bail. *State v. Scott*, 20 Iowa, 64.

BAIL BOND FORFEITURE—AMOUNT TO BE PAID TO THE COUNTY WHERE THE DEFENDANT IS HELD TO APPEAR.

Where a defendant takes a change of venue to another county, and gives bail for his appearance at the District Court of the latter county, which is forfeited for want of

appearance, the forfeiture belongs to the county where, by the terms of the bond, the defendant was to appear, instead of the county where the indictment was found. *Decatur County v. Maxwell*, 26 Iowa, 398.

FORMATION OF TRIAL JURIES AND THEIR CHALLENGES.

SECTION 4389. The jury for the trial of criminal actions is selected, drawn and summoned as provided in Code of Civil Practice.

SEC. 230. Unless the judge otherwise orders, jurors shall be summoned to appear at ten o'clock A. M. of the second day of the term, at which time they shall be called and all excuses heard and determined by the court. If any person summoned fail to appear without sending a sufficient excuse, the court shall issue a rule returnable at that or the succeeding term, requiring him to appear, and show cause why he should not be fined for contempt, and unless he renders a sufficient excuse for such failure, the court may fine him in any amount not exceeding ten dollars, and shall require him to pay the costs, and stand committed until the fine and costs are paid.

SEC. 232. Should there not be the number of trial jurors in attendance, as provided in the preceding section, by reason of a failure of the persons summoned to attend, or because excused as provided in section two hundred and thirty of this chapter, the requisite number of persons to supply the deficiency shall be drawn in the same manner as provided in sections two hundred and forty and two hundred and forty-one of this chapter. The persons so drawn shall be forthwith summoned to appear, and serve as trial jurors during the term.

SEC. 233. If, in the judgment of the court, the business of the term does not require the attendance of all, or a portion of the trial jurors, they, or such portion as the court deems proper, may be discharged. Should it afterward appear that a jury is required, the court may direct them to be resummoned, or empanel a jury from the bystanders.

SEC. 4390. At the opening of the court, the clerk shall prepare separate ballots, containing the names of the persons returned as jurors, which shall be folded each in the same manner, as near as may be, and so that the name thereon shall not be visible, and must deposit them in a box to be kept for that purpose.

SEC. 4391. When the indictment is called for trial and before drawing the jury, either party may require the names of all the jurors in the panel to be called, and that an attach-

ment issue against those who are absent, but the court may, in its discretion, wait or not for the return of the attachment.

SEC. 4392. Before the name of any juror is drawn, the box must be closed and shaken, so as to intermingle the ballots therein, and the clerk shall draw such ballots without seeing the names written on them, from the box, through the top or lid thereof.

SEC. 4393. When the jury is completed, the ballots containing the names of the jurors sworn must be laid aside and kept apart from the ballots containing the names of the other jurors, until the jury so sworn is discharged.

SEC. 4394. After the jury is so discharged, the ballots containing their names must be again folded and returned to the box, and so on, as often as a trial is had.

SEC. 4395. If a juror be absent when his name is drawn, or be set aside or excused from serving on that trial, the ballot containing his name must be folded and returned to the box as soon as the jury is sworn.

SEC. 4396. If by reason of there being one or more juries empaneled, or for any other reason there should not remain any ballots undrawn, or if in consequence of jurors being set aside no jury can be obtained from the list of those returned by the sheriff for the trial of issues, the court may order the sheriff, or if he be a party to or interested in the cause, some other person, to summon jurors from the bystanders, or other persons, who shall be returned for the trial of the indictment.

SEC. 4397. The jury consists of twelve men accepted and sworn to try the issue.

JURY—WAIVER OF IN MISDEMEANORS.

While it is conceded that a defendant cannot waive a jury in cases of felony, this question arises sometimes in the District Courts in cases of misdemeanors, and this question has not yet been determined by the Iowa Supreme Court, but in case of *Darst et al. v. People*, where the defendants were indicted for a riot and tried before the judge and convicted, and the jury was waived by consent of defendants, the Supreme Court of Illinois in that case say, in the latter part of the opinion, *per* LAWRENCE, J., "It is urged that a jury could not be waived, but we know no reason why it may not be in trials for *misdemeanors*," and sustain the conviction. 51 Ill., 286; 2 Am. R., 301.

DRAWING JURORS, MODE OF.

Where a jury is called, on a special *venire*, for the trial of

a particular indictment, their names may be called in the order in which they were summoned by the sheriff. If summoned for the whole or remaining term, their names should be placed in the box from which they should be drawn, and the better practice is to draw all from the box instead of from a list. *State v. Green*, 20 Iowa, 425.

JURY MAY BE DRAWN BOTH FOR CIRCUIT AND DISTRICT COURT FROM THE SAME LIST.

Both juries for the Circuit and District Court may be drawn from the same list, a separate list for the Circuit Court is not required. *State v. Lawrence*, 38 Iowa, 51.

JURY LIST DESTROYED BY FIRE.

When the list of jurors has been destroyed by fire, it is competent for the District Court to cause a precept to be issued to the sheriff, directing him to summon a new panel from the body of the county. *State v. Arthur*, 39 Iowa, 631; under section 2738, Rev., 1860, which is the same as section 241, Code, 1873, being fully set out in chapter entitled "Selecting, drawing and empaneling Grand Jury."

A PRECEPT ISSUED MAY BE SERVED BY DEPUTY SHERIFF OR SPECIAL CONSTABLE.

The precept here mentioned may be served by a deputy sheriff or constable. *State v. Arthur*, 31 Iowa, 631.

BODY OF COUNTY, CONSTRUCTION.

Under said section 244, "summoned from the body of the county" is meant from the county at large, from the people of the county competent to act as jurors. So, to summon out of ten townships, in place of twenty, is legal, and not in violation of law. *State v. Arthur*, 39 Iowa, 633.

FORMER ADJUDICATION AND ACQUITTAL.

The Iowa State constitution provides, Section 12, Article 1, Bill of rights, Code of 1873, page 771: "No person shall, after acquittal, be tried for the same offense."

It is also provided by sub-division three, Section 4359, Code of 1873, page 677: "A former judgment of conviction or acquittal of the offense charged, which may be pleaded

with or without the plea of not guilty, and this plea may be in the form following: The defendant pleads that he has formerly been convicted (or acquitted) of the offense, that in the indictment by the judgment of the court of the District Court of Linn county, Iowa, rendered on the —— day of —— 1877.

SEC. 4364. A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment on which the conviction or acquittal took place.

SEC. 4365. When the defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former or for any lower degree of that offense, or for an offense necessarily included therein.

SEC. 4366. The judgment for the defendant on a demurrer, except where it is otherwise provided, or for an objection to its form or substance taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense.

This plea in justice's court may either be in writing or oral; if oral the justice shall make an entry of such plea in his docket. In the District Court the plea should be in writing.

FORMER TRIAL—TWICE IN JEOPARDY.

As a general principle of law a person cannot be twice tried, convicted or acquitted, and put in jeopardy for the same offense. As is said in *State v. Layton*: "The law abhors even the splitting of civil actions; and if A sues for and recovers a part of a continued account, such recovery is a bar to a second suit though for another part of the same account. And such splitting of actions or offenses should not be allowed in criminal proceedings." *State v. Layton* 25 Iowa, 197; *State v. Callendine*, 8 Ib., 290; *United States v. Shoemaker*, 2 McClean, 114; *Crenshaw v. State*, Martin & Yerger, Tenn., 122; *State v. Cooper*, 1 Green, N. J., 361; *Commonwealth v. Olds*, 5 Littel (Ky. R.), 137; 2 Hawkins' P. Cr., 515, 526; *Moore v. People*, 14 Howard, 13; *Ex-parte Lange*, 18 Wallace, 163; 2 Green's Cr. R., 103.

TIME NAMED IN THE INDICTMENT.

A subsequent prosecution for the same offense growing out of the same transaction cannot be sustained within the time mentioned in the indictment. *Our House No. 2 v. State*, 4 G. Greene, 172.

SECOND INDICTMENT.

Of course there can be no question as to the right of the State to prosecute a second indictment for acts done after the finding of the first. 1 Wharton's Cr. Law, Sec. 548; *Ward v. Corporation of Wash.*, 4 Cranch. O. C., 232; *State v. Layton*, 25 Iowa, 197.

KEEPING LIQUOR WITH INTENT TO SELL, AND SELLING.

An indictment charging the offense to have been committed at a particular time and place by keeping intoxicating liquors with intent to sell, is the same as charging at the same time and place the *selling* of intoxicating liquor, and the one is a bar to the other, and this is not varied by the fact that one of the indictments charges the violation as on the 1st and the other on the 15th of the same month, as it may be shown to have been committed at any time prior to the finding of the indictment, though a particular time is specified. *State v. Layton*, 25 Iowa, 193.

PROSECUTION BROUGHT ABOUT BY DEFENDANT IS NO BAR.

Where a defendant pleads guilty before a Justice before any proceedings have been instituted, or procures some other person to prosecute with a view of escaping punishment such as his crime merits, the prosecution is a farce and is no bar to a future adjudication. *State v. Green and Mann*, 16 Iowa, 239; *State v. Brown*, 12 Conn., 54; *Cone v. Jackson*, 2 Va., 10, 501; *State v. Little*, 1 N. H., 257, 258; *State v. Lowrie*, 1 Swan, 74; *State v. Corbin*, 11 Hump., 599. Thus, going into a favorable court and submitting to a conviction, in order to escape a severe penalty, is no bar. Freeman on Judgments, Section 318.

PERMITTING MINORS IN SALOONS—DATES.

To charge a defendant with permitting a minor, M, to remain in a billiard saloon on the 15th, and a prosecution on

that charge, is no bar to a prosecution brought afterwards for a violation by permitting another minor, B, to remain in defendants' saloon on the 2d of the same month; being different parties one would not bar the other, though the first violation is prosecuted last. *State v. Dirrichs*, 42 Iowa, 196.

ASSAULT AND BATTERY.

An assault and battery is no bar to an indictment for an assault with intent to commit great bodily injury. *State v. Foster*, 33 Iowa, 525.

SEVERAL ACTS—FORGING SEVERAL CHECKS.

Where one, at the same time and by the same act, passed four forged checks it was held that he was guilty of but one offense, and that a conviction for uttering one of the checks was a bar to a conviction upon the others. *State v. Egglesht*, 41 Iowa, 574. While it was held in *Regnia v. Brettel*, 1 Carr. & Marsh., 609, that where the defendant stole two pigs at one time, and was convicted and punished for stealing one, such conviction could not be pleaded in bar to a subsequent prosecution for stealing the other pig. But the decided weight of authority seems to be opposed to this last case. *Lorton v. State*, 7 Mo., 55; *State v. Nelson*, 29 Mo., 329; *State v. Williams*, 10 Hump., 101; *State v. Morphine*, 37 Mo., 373; *Jackson v. State*, 14 Ind., 327. Where one steals several articles at the same time, and being the same act, it is all one transaction, and the conviction of one is a bar to any other. *Ben. v. State*, 22 Ala., 9; *Rex v. Benfield*, Burr, 980; *Clem. v. State*, 42 Ind., 420; *Quitson v. State*, 1 Texas Court of Appeals, 47; *Black v. State*, 33 Ga., 187.

COMMENCEMENT OF TRIAL.

Where a jury was impaneled and sworn and the State proceeded to offer its evidence, when it appeared that M was the only witness for the prosecution and his name was not indorsed upon the indictment, whereupon the court discharged the jury and held the defendant on bail, this was adjudged to be a trial and a bar. *State v. Callendine*, 8 Iowa, 290. So, where the defendant was put upon trial on Saturday and the court commenced in another county on the following Monday, whereupon the jury was discharged and defendant held for

further trial, the court held this to be a good plea in bar. *State v. Wright*, 5 Ind., 290; *State v. McPherson*, 9 Iowa, 54; *Mount v. State*, 14 Ohio, 295.

DISCONTINUING.

In case of the *United States v. Shoemaker*, where the defendant was indicted for taking letters from the mail, and a jury having been impaneled and evidence introduced, the prosecutor dismissed the case, this was held to be a bar. 2 McLean, 114; *State v. Callendine*, 8 Iowa, 290.

NOLLE PROSEQUI.

The public prosecutor may enter a *nolle prosequi* before the trial is entered upon and it will be no bar, but after plea and jury sworn he cannot. 2 McLean, 114; 8 Iowa, on page 292. So in case of *Commonwealth v. Wade*, 17 Pick. 395, the court say there was no necessity, no unforeseen cause of delay, no accident, no mistake, an ordinary case of good indictment, but a failure of proof. *State v. Callendine*, 8 Iowa, 293. So in *Commonwealth v. Cook*, 6 S. and R., 577, the court held that a discharge of the jury once sworn in a criminal case was an acquittal of the defendant. *Mount v. State*, 14 Ohio, 296; *Jones v. State*, 55 Ga., 625; 1 Am. Cr. R., Hawley, 510.

IMPANELING OF JURY—STATEMENT BY COUNSEL.

Where the jury was impaneled, witnesses sworn, and the cause stated to the jury by counsel, and at this stage the prosecutor stated to the court that there was a variance in the date of the commission of the murder and that in the indictment, and dismissal, this was held an adjudication. *Lee v. State*, 26 Ark., 260; 7 Am. R., 611.

FOR CAUSES GENERALLY.

In case of *Klock v. People*, 2 Park Cr. R., 676, defendant was put upon trial, and during the trial a juror was withdrawn against the defendant's objection (the reason for withdrawing is not given), the court held this to be a bar. See also *People v. Olcott*, 2 Johnson's Cases, 301. *State v. Walker*, 26 Ind., 346. The court hold when the defendant is put on trial on a good indictment before a legal jury and the jury is dis-

charged without the consent of the defendant, this is a bar. So, if the jury is discharged in case of a misdemeanor because the district attorney was not prepared with the evidence, it is a bar. *People v. Barrett and Ward*, 2 Caines' Cases, 100 to 304; 7 Am. R., on page 617.

EXCEPTIONS.

In general it may be said that jeopardy begins when a trial jury, upon a sufficient indictment, in a court of competent jurisdiction, has been impaneled and sworn to try the cause. 2 Leading Cr. Cases, 358. But the jeopardy is not considered as attaching in such cases, although the jury has been sworn, if, during the trial, the presiding judge becomes so ill as to be unable to proceed. *Nugent v. State*, 4 Stew. & Port., 72; or if a juror's illness prevents him from sitting further on the trial. *King v. Scalbert*, 2 Leach, 620; *United States v. Haskell*, 4 Wash., 402; or if the prisoner's certain illness incapacitates him from attending or managing his defense. *King v. Stevenson*, 2 Leach, 541; *State v. Redman*, 17 Iowa, 329; *State v. Mead*, 4 Blackf., 309.

VERDICT—DEFECTIVE.

Where the verdict is defective the court should set it aside, especially when one of guilty, when it is uncertain and against the objection, and this is no bar to another trial. *State v. Redman*, 17 Iowa, 329, and authorities cited; and *State v. Duncan*, 2 McCord, 129; *State v. Arthur*, 21 Iowa, 323; though the better practice is to let the jury retire for further deliberation.

VERDICT—VALUE—JURISDICTION.

Where a defendant was charged on an information alleging the value to be within the jurisdiction of a police court, tried by a jury and the jury returning as their verdict the value of the property to be beyond that of which a police court had power to try, and the jury discharged, no judgment being rendered on the verdict, but the prisoner held to give bonds for his appearance at court, *held* not to be an adjudication, though the better practice is to file a new information and proceed on a preliminary examination. In order to constitute a bar the court must have had jurisdiction to try a cause, and the

one at bar being a felony the police court could not place upon trial the prisoner, but hold an examination only. Consequently the trial, being without authority of law, constituted no adjudication. 3 Greenleaf Ev., 37; 2 Broom & Hadley Com. (Am. ed.), 601; *Commonwealth v. Peters*, 12 Metc., 387; *State v. Odell*, 4 Black., 156; *Thompson v. State*, 6 Nebraska R., 102.

DISAGREEMENT OF JURY.

The discharge of the jury in a criminal prosecution on the ground that they are not able to agree, is not a bar to another trial, and the defendant is not considered as in jeopardy twice. *State v. Redman*, 17 Iowa, 329; *State v. Vaughn*, 29 Iowa, 286; *People v. Goodwin*, 18 Johnson, 187; *Mounts v. State*, 14 Ohio, 304; *U. S. v. Perez*, 9 Wheaton, 579; *Ex parte Lange*, 18 Wallace, 163; 2 Green's Cr. R., 111; *Casborris v. People*, 13 Johnson, 351.

TRIAL AND ACQUITTAL BEFORE A JUSTICE.

Where the defendant has been tried and acquitted before a justice, the State cannot again put him on trial on an appeal. *State v. Van Horton*, 26 Iowa, 402.

ORDINANCE—STATE LAW.

A conviction for the violation of an ordinance is no bar to a conviction under the State law. The same act may constitute an offense, both against the State and a corporation, and both may punish it without infringing any constitutional right. *City of Brownville v. Minnie G. Cook*, 4 Neb., 101; *State v. Charleston*, 12 Rich. (S. C.), Law, 480.

RETRIAL UPON REVERSAL BY SUPREME COURT.

Where the defendant was indicted and put upon his trial on a charge of murder in the second degree, and found guilty of manslaughter, and from this judgment and verdict appealed, and the cause was reversed, he could not again be put upon trial for murder in the second degree; but it is presumed that the jury found him not guilty of murder, and though the verdict does not say "not guilty of murder in the second degree," yet the finding of a lower degree, to-wit: manslaughter, is equivalent to such finding. *State v. Tweedy*, 11 Iowa, 350; *State v.*

Ball, 27 Mo., 324; *People v. Gilmore*, 4 Calif, 376; *State v. Hornsby*, 5 La., 558; *Slaughter v. State*, 6 Humph., 413; *Jones v. State*, 13 Texas, 184; *Brennan v. People*, 15 Ills., 517; *State v. Rofs*, 29 Mo., 32; 2 Virginia Cases, 311; 2 Tyler, 472; 9 Yerger, 335; Cooley on Cons. Lim., 326; *Gee v. Keenan*, 7 Wis., 695; *State v. Kemp et al.*, 17 Wis., 669; *Lesslie v. State*, 18 Ohio St., 390, 395; *State v. Martin*, 30 Wis., 216; 11 Am. R., 567.

Opposed to this doctrine may be cited *Morris v. State*, 1 Blackf., 37, where the question was disposed of without argument; and in *United States v. Wallace, Jr.*, 147; all that is found is a remark of Mr. Chief Justice GRIER, to the prisoners, when determining the motion for a new trial, but which was made without reference to authorities, and without an attempt to show its correctness. *State v. McCord*, 8 Kansas; 12 Am. R., 469.

RETRIAL FOR SAME OFFENSE—PROCEDENDO.

When a judgment of conviction is reversed on appeal, because of erroneous proceedings in the court below, legal jeopardy will not be deemed to have attached, nor can a defendant claim that a second trial is illegal, on the ground of not having a *procedendo* returned and filed. *State v. Knouse*, 33 Iowa, 365; *State v. Redman*, 17 Iowa, 329; *State v. Tweedy*, 11 Iowa, 350; *Sutcliff v. State*, 18 Ohio, 469, 478; *People v. Olewell*, 28 Cal., 456.

A CONVICTION UNDER AN INSUFFICIENT INDICTMENT WILL NOT AUTHORIZE A CONVICTION FOR A LESSER OFFENSE.

Where a defendant is prosecuted for an offense of a higher degree than he could be legally convicted of under the indictment, he cannot be legally convicted of a lesser offense, though the indictment is good as charging the offense in that degree. It was accordingly held in a case where the defendant, having been put upon his trial for murder in the first degree, for which the indictment was insufficient, that his conviction for murder in the second degree, for which the indictment was good, was unauthorized. *State v. Boyle*, 28 Iowa, 522.

DISMISSAL BEFORE COMMENCEMENT OF TRIAL.

At any time before the jury is impaneled and sworn, the prosecutor may dismiss one or all of the counts of the indictment without prejudice to a further or new proceeding for the same offense. *State v. McPherson*, 9 Iowa, 53; *Com. v. Gillispie*, 7 Serg. & R., 469; 12 Met., 444; *State v. Ingram*, 16 Kansas, 14; Freeman on Judgments, Sec., 318.

DOCKET OF A JUSTICE.

Where a former conviction is pleaded, and the docket introduced, it is error for the court to instruct that the evidence in relation to a former conviction cannot be considered for the reason that the docket of the justice before whom such former trial should have been had, was not handed to the jury to make it evidence; it was not necessary to hand it to the jury. *Binder v. State*, 5 Iowa, 458.

LOST INDICTMENT.

Where the first indictment was mislaid, and a second found, to which a motion to dismiss was sustained, and the first again found, this second finding of an indictment is no bar to the first. *Redman v. State*, 4 G. Greene, 137; *People v. Monroe*, 20 Wendell, 108; *State v. Whitmore*, 5 Pike, 247.

DEGREE OF OFFENSES—THE MINOR DOES NOT INCLUDE THE GREATER.

A conviction or acquittal in order to be a bar to another prosecution, must be for the same offense, or for an offense of a higher degree, and necessarily including the offense for which the defendant stands indicted. So that an acquittal for a minor offense is no bar to a prosecution for a greater offense. *State v. Foster*, 33 Iowa, 525.

MURDER—MANSLAUGHTER—WHEN A BAR.

An acquittal for manslaughter is a bar to an indictment for murder, for the reason that if the defendant was innocent of the killing without malice, he could not be guilty of the killing with malice. *Scott v. U. S.*, Morris, 142; *Hunt v. State*, 25 Miss., 378; *Burns v. People*, 1 Park Cr. R., 182; *State v. Foster*, 33 Iowa, 525.

DEMURRER—RULING ON A BAR.

Where the court gives a defendant a judgment on his demurrer, it is not considered the commencement of his trial, and he can be indicted for the same offense. 1 Bishop's Cr. Law, page 496, section 865, 4th edition. To this, however, it seems there may be an exception in this: Take cases where the acts which the defendant is sought to be convicted for are set out, and a demurrer sustained, on the ground that these acts do not constitute a crime, then it would seem that the ruling on the demurrer and discharge of the defendant might be pleaded as a former adjudication to a second indictment and trial for the same acts set out in the indictment; as is said by WRIGHT, C. J., in *Keater & Skinner v. Hock, Musser & Co.*, 16 Iowa, 24: "If plaintiffs based their right to recover upon the same grounds, the judgment upon the demurrer would be as conclusive as though rendered upon a verdict. And it is upon this theory, evidently, that the case of *Coffin v. Knott*, 2 G. Greene, 582, was decided. Of the same character is the case of *Perkins v. Moore*, 16 Ala., 17, for, unquestionably, there may be cases where a judgment on a question of law, the facts being admitted by demurrer or otherwise, will bar a renewal of the controversy; for, in such cases, there is substantially a judgment on the merits." While this was decided in a civil case, it would apply with greater weight to a criminal proceeding; the same principle of law governs in criminal as well as civil cases. Freeman on Judgments, section 318.

PLEA OF NOT GUILTY MERELY DOES NOT ADMIT EVIDENCE OF FORMER ADJUDICATION.

A former trial and sentence cannot be given in evidence under a plea of not guilty, merely; there must be a special plea of a former acquittal and adjudication. *People v. Benjamin*, 2 Park Cr. R., 201.

DISCHARGE ON HABEAS CORPUS, EFFECT OF.

See title "Habeas Corpus."

ESTOPPEL BY ACTS OF DEFENDANT.

A motion to dismiss and discharge the defendant should not be sustained on the ground that he has had no speedy trial,

the case, being continued from term to term, when it appears that it was by reason of the acts and motions of the defendant himself; for instance, he cannot go beyond the jurisdiction of the court for a term or more, and then make his appearance, and move to dismiss for the reason that he has had no speedy trial. *State v. Arthur*, 21 Iowa, 322.

ROBBERY—LARCENY.

A trial and acquittal for robbery is a bar to an indictment for larceny, where the property alleged to have been taken is the same. *People v. McGowan*, 17 Wend., 386.

BURGLARY—LARCENY.

Under a statute allowing both burglary and larceny to be charged, and the defendant put upon his trial for both, and where he was convicted of burglary, this operated as an acquittal of the larceny. *Bell & Murray v. State*, 48 Ala., 684; 2 Greene Cr. R., 623; 17 Am. R., 40-3; Coldwell, Tenn., 82.

PRINCIPAL AND ACCESSORY.

Under the law of New Hampshire, where the distinction still exists as between a principal and accessory, it is held that "Neither an acquittal upon an indictment for larceny, nor conviction upon an indictment for receiving stolen goods, is a bar to a subsequent indictment, charging the same respondent with being an accessory before the fact to the stealing of the same goods. *State v. Larkin*, 49 N. H., 36; 6 Am. R., 456.

PLEA IN ABATEMENT—TURNING STATE'S EVIDENCE.

See title "Evidence."

FOREIGN STATE COURTS—CONVICTION.

Where the prisoner was indicted for forgery in Nebraska, and pleaded a former adjudication, that he had been put upon his trial for the same offense in Illinois, and was there acquitted, the court held "that Illinois being a foreign state, and the principle seems well settled, that the laws of a country do not extend beyond its territorial limits; and that the rule of constitutional law cannot span country and country in such a way as to cause a jeopardy in one country to free the party from trial in another. On the one hand, it cannot prevent a foreign government from prosecuting for crime a person who

has been tried for the same offense by our courts; and on the other hand, it cannot exempt from the prosecution here, one who has been tried abroad. 1 Bishop's Crim. Law, section 933; *Marshall v. Sate*, 6 Nebraska R., 120.

FUGITIVES FROM JUSTICE.

SECTION 4171. The governor of the state may, in any case authorized by the constitution and laws of the United States, appoint agents to demand of the executive authority of any other state or territory, or from the executive authority of any foreign government, any fugitive from justice charged with treason or felony, and the accounts of the agents appointed for that purpose must be audited by the auditor of state and paid out of the state treasury.

LAWS OF 1878, CHAPTER 65—FEES OF AGENTS FOR RETURN OF FUGITIVES FROM JUSTICE.

AN ACT to Amend Section 4171 of the Code, Relating to Fugitives from Justice.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That section 4171 of the Code, be, and the same is hereby amended by adding thereto the following:

The expenses to be allowed agents for returning fugitives from justice, shall be the fees paid the officers of the state upon whose governor the requisition is made; and the agent shall receive not exceeding ten cents per mile, each way, for all necessary travel of himself; and for each fugitive, five cents per mile additional for the number of miles which such fugitive shall have been conveyed.

Bills for such expenses shall be made out in such manner as to show the actual route traveled, and the number of miles, and be verified by affidavit, and be accompanied by proof that the fugitive for whom requisition was made has been returned and delivered into the custody of the proper authority; *Provided*, That the State shall, in no case, pay the costs of returning the fugitive where he has not been tried, unless it shall be shown to the satisfaction of the governor that the want of trial has not been owing to any fault or neglect on the part of the person or persons interested in the prosecution.

SEC. 2. This act, being deemed of immediate importance, shall take effect and be in force from and after its publication in the Iowa State Register, and Iowa State Leader, newspapers published at Des Moines, Iowa.

Approved, March 21, 1878.

I hereby certify that the foregoing act was published in the *Iowa State Leader*, March 22, and in the *Iowa State Register*, March 23, 1878.

JOSIAH T. YOUNG, *Secretary of State*.

SEC. 4172. No compensation, fee or reward of any kind, can be paid to, or received by, a public officer of this state for a service rendered or expense incurred in procuring from the governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this state, or detaining him therein, except as provided by law.

SEC. 4173. A violation of the last section is a misdemeanor.

SEC. 4174. No executive warrant for the arrest and surrender of any person demanded by the executive authority of any other state or territory, as a fugitive from the justice of such state or territory, and no requisition upon the executive authority of any other state or territory, for the surrender of any person as a fugitive from the justice of this state, shall be issued, unless the requisition from the executive authority of such other state or territory, or the application for such requisition upon the executive authority of such other state or territory shall be accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, or a duly attested copy of a complaint, made before a court or magistrate authorized to receive the same.

SEC. 4175. Whenever a demand is made upon the governor of this state by the executive of any other state or territory, in any case authorized by the constitution and laws of the United States, for the delivery of any person charged in such state or territory with any crime, if such person is not held in custody or under bail to answer for any offense against the laws of the United States or of this state, he shall issue his warrant under the seal of the state authorizing the agent who makes such demand, either forthwith or at such time as may be designated in the warrant, to take and transport such person to the line of this state at the expense of such agent, and may also by such warrant require all peace officers to afford all needful assistance in the execution thereof.

EXAMINATION BY MAGISTRATE.

SEC. 4176. If any person be found in this State charged with any crime committed in any other State or territory and liable by the constitution and laws of the United States to be delivered over upon the demand of the governor thereof, any magistrate may, upon complaint on oath setting forth the offense and such other matters as are necessary to bring the case within the provisions of law, issue a warrant for the arrest of such person.

SEC. 4177. If, upon examination, it appear that there is reasonable cause to believe the complaint true, and that such person may be lawfully demanded of the governor, he shall, if not charged with murder, be required to enter into an un-

dertaking, with sufficient surety in a reasonable sum, to appear before such magistrate at a future day, allowing reasonable time to obtain the warrant from the governor, and abide the order of such magistrate in the premises.

SEC. 4178. If such person does not give bail, or if he is charged with the crime of murder, he must be committed to prison, and there detained until such day in like manner as if the offense charged had been committed within this State.

SEC. 4179. A failure of such person to attend before the magistrate at the time and place mentioned in the undertaking, is a forfeiture thereof.

SEC. 4180. If such person appear before the magistrate upon the day ordered, he must be discharged unless he is demanded by some person authorized by the warrant of the governor to receive him, or unless the magistrate see good cause to commit him or to require him to enter into a new undertaking for his appearance at some other day to await a warrant from the governor.

SEC. 4181. Whether the person so charged be bound to appear, be committed, or discharged, any person authorized by the warrant of the governor may at any time take him into custody, and the same is a discharge of the undertaking, if there be one.

SEC. 4182. The complainant in any such case is answerable for all the costs and charges, and for the support in prison of any person so committed, and the magistrate before issuing his warrant or hearing the cause, must require the complainant to give security for the payment of all such costs, or may require them in advance.

SEC. 4183. Upon the appointment of any agent for the arrest of a fugitive from justice under the provisions of this chapter, the governor is hereby authorized to make it a condition upon such appointment, and the issue of the writ, if in his opinion justice and equity so require.

SEC. 4184. When, in the opinion of the governor, expenses incurred in the arrest of fugitives from justice should be paid by the State, such expenses shall be made out by items in detail, and sworn to, and approved by him and at least two other members of the executive council, and when so approved shall be audited and paid out of the general revenue of the State, and this section shall be sufficient authority for the payment of the same.

DEFENDANT ENTITLED TO THE RIGHT OF BAIL.

Under Section 4524, Rev. 1860, which is the same as Section 4177, Code of 1873, a defendant has the right to enter into bail. *State of Iowa v. Hufford*, 23 Iowa, 579.

COPY OF INDICTMENT WITH RETURN NOT ESSENTIAL.

The Governor of Indiana upon the requisition of the Governor of Kentucky, issued his writ for the arrest of A, as a fugitive from justice. The writ stated that a requisition had been made, &c., which set forth that A had been indicted, &c., a certified copy of which indictment accompanied the requisition; and the writ required A to be delivered to B, as an agent to receive A, and convey her to Kentucky. B made return that he held A in custody by virtue of the writ, &c., but did not accompany the return with a copy of the indictment. *Held*, that this was not necessary; *held*, also, that the writ was *prima facie* evidence, that an indictment was pending against A, as alleged therein. *Nicholas v. Cornelius*, 7 Indiana, 611.

GENERAL CUSTOM AND USAGE OF STATES AND NATIONS.

It is the law and usage to deliver up fugitives from justice, charged with felony and other high crimes, who have fled into a friendly jurisdiction; and it is the duty of the civil magistrate to commit such fugitive in order to make his surrender. *Ex Parte Washburn*, 4 Johnson Ch., 106; 3 Wheeler's Cr. Cases, 473.

EVIDENCE SUFFICIENT TO DETAIN.

The evidence to detain such fugitive, for the purpose of surrender, must be such as would be sufficient to commit him for trial had the crime been perpetrated here. *Ib*.

COURTS—EXAMINATION OF PROCEEDINGS.

Where a fugitive from justice is brought up on *habeas corpus*, the court will not inquire into his probable guilt, but only as to the legality of the process, and the regularity of the commitment. *Ex parte Clark*, 9 Wendell, 212; *People v. Brady*, 56 N. Y., 182.

AFFIDAVIT SHOULD BE POSITIVE AND CERTAIN.

The affidavit for the arrest of a fugitive from justice must state positively that the crime was committed within the State from which he fled; and that he is actually a fugitive from that State. *Ex parte Heyward*, 1 Sand., 701; *People v. Brady*, 56 N. Y., 182.

INSUFFICIENCY OF AFFIDAVIT.

An affidavit stating that the prisoner is charged with the crime of forgery in another State, is not sufficient for his detention. *Ex parte Leland*, 7 Abb. Pr. (N. S.), 64.

SUFFICIENT TO AUTHORIZE THE SURRENDER OF A FUGITIVE FROM JUSTICE.

In order to authorize a surrender, there must be a demand by the executive of the State from which he fled; and a copy of the indictment or affidavit, charging the offense, must be produced and certified by such executive as authentic. An affidavit, sworn to before a justice of the peace, and a certificate by the executive that he is such an officer, and that his attestation is in due form, is not sufficient. *Ex parte Solomans*, 1 Abb. Pr. (N. S.), 347.

DISCHARGE OF FUGITIVE IF NOT DEMANDED WITHIN A REASONABLE TIME.

An alleged fugitive from justice, if not demanded in a reasonable time by the executive of the State from which he fled, will be discharged from arrest. *People v. Goodhue*, 2 Johns. Ch., 198; 1 Wheeler's Cr. Cases, 427; *Ex parte Washburn*, 4 Johns. Ch., 106.

ACTS INDICATING THAT THE DEFENDANT IS A FUGITIVE.

If a citizen and resident of another State defraud citizens of this State by means of false pretences, for which he is indicted here, and having come voluntarily within the jurisdiction, afterwards suddenly leave the State under circumstances indicating a design to avoid a prosecution for the offense, he is a fugitive from justice within the meaning of the constitution and the act of Congress. *Ex parte Adams*, 7 Law Rep., 386.

HABEAS CORPUS.

The writ of *habeas corpus* is that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained. It takes its name from the emphatic words which it contained when it was written in Latin. The writ was directed to the person detaining another, and commanded him to produce the body of the prisoner or person detained, together with the day and cause of his caption and

detention, to submit to and receive whatsoever the court or judge awarding the writ might consider in that behalf. Employed to vindicate the right of personal liberty by whatever power infringed, it became inseparably associated with that right; and in proportion as the right was valued, so was the writ by which it was defended. It was its grateful office which commended this species of the writ to the favorable regard of the people, and finally dignified it as the writ of *habeas corpus*.

There were, indeed, other writs at common law which in particular cases were used to obtain a similar object, but being more limited in their application and more complicated and slow in their operation, they gradually fell into disuse. The date of the origin of the writ of *habeas corpus* is unknown. It is supposed to have been in use before the date of the Magna Charta. But a diligent inquirer, having access to the best sources of information, states the result of his investigation into the origin of the writ as follows: "The writ of *habeas corpus* is found in operation at a remote period of the English law. The earliest reign in which I have been able to trace its frequent appearance, is that of Henry VI. At that period it seems to have been familiar to and well understood by the judges. After this period the existence of the writ of *habeas corpus* is distinctly observed, and its progress can be effectually traced.

"In its early history it appears to have been used as a means of relief from private restraint. The earliest precedents where it was used against the crown are in the reign of Henry VII. Afterwards the use of it became more frequent, and in the time of Charles I, it was held an admitted constitutional remedy. Though the writ of *habeas corpus* originated in the common law of England, the leading idea of it, deliverance by summary legal process from illegal confinement, may be traced in the laws of other countries which derived none of their principles of jurisprudence or rules of procedure from English law."

CONSTITUTION OF THE UNITED STATES.

The privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.

CONSTITUTION OF IOWA.

SEC. 13. The writ of habeas corpus shall not be suspended, or refused when application is made as required by law, unless in case of rebellion or invasion, the public safety may require it.

INSANE PERSONS.

SEC. 1444. All persons confined as insane shall be entitled to the benefit of the writ of habeas corpus, and the question of insanity shall be decided at the hearing, and if the judge shall decide that the person is insane, such decision shall be no bar to the issuing of the writ a second time, whenever it shall be alleged that such person has been restored to reason.

CODE OF 1873, CHAPTER 13.

SEC. 3449. The petition for the writ of habeas corpus must be sworn to, and must state:

1. That the person in whose behalf it is sought is restrained of his liberty, and the person by whom, and the place where he is so restrained, mentioning the names of the parties, if known, and if unknown, describing them with as much particularity as practicable.

2. The cause or pretense of such restraint, according to the best information of the applicant; and if it be by virtue of any legal process, a copy thereof must be annexed, or a satisfactory reason given for its absence.

3. It must state that the restraint is illegal, and wherein.

4. That the legality of the imprisonment has not already been adjudged upon a prior proceeding of the same character, to the best knowledge and belief of the applicant.

5. It must also state whether application for the writ has been before made to, and refused by, any court or judge, and if such application has been made, a copy of the petition in that case, with the reasons for the refusal thereto appended, must be produced, or satisfactory reasons given for the failure to do so.

SEC. 3450. The petition must be sworn to by the person confined, or by some one in his behalf, and presented to some court or officer authorized to allow the writ.

SEC. 3451. The writ of habeas corpus may be allowed by the Supreme, district, or circuit court, or by any judge of either of those courts, and may be served in any part of the State.

SEC. 3452. Application for the writ must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to for the writ, may refuse the same unless a sufficient reason be

stated in the petition for not making the application to the more convenient court, or a judge thereof.

SEC. 3453. If, from the showing of the petitioner, the plaintiff would not be entitled to any relief, the court or judge may refuse to allow the writ.

SEC. 3454. If the writ is disallowed, the court or judge shall cause the reasons of said disallowance to be appended to the petition and returned to the person applying for the writ.

WRIT ALLOWED.

SEC. 3455. But if the petition show a sufficient ground for relief, and is in accordance with the foregoing requirements, the writ shall be allowed, and may be substantially as follows:

THE STATE OF IOWA,

To the sheriff of, &c., [or to A.... B...., as the case may be.]

You are hereby commanded to have the body of C ... D...., by you unlawfully detained, as is alleged, before the court [or before me, or before E.... F...., judge, &c., as the case may be] at....., on....., [or immediately after being served with this writ,] to be dealt with according to law, and have you then and there this writ, with a return thereon of your doings in the premises.

SEC. 3456. When the writ is allowed by a court it is to be issued by the clerk, but when allowed by a judge he must issue the writ himself, subscribing his name thereto without any seal.

SEC. 3457. Any judge, whether acting individually or as a member of the court, who wrongfully and willfully refuses such allowance of the writ when properly applied for, shall forfeit to the party aggrieved the sum of one thousand dollars.

SEC. 3458. Whenever any court or judge authorized to grant this writ, has evidence, from a judicial proceeding before them, that any person within the jurisdiction of such court or officer is illegally imprisoned or restrained of his liberty, such court or judge shall issue, or cause to be issued, the writ as aforesaid, though no application be made therefor.

SEC. 3459. The court or officer allowing the writ, must cause the district attorney of the county to be informed of the issuing of the writ, and of the time and place where and when it is made returnable.

SERVICE.

SEC. 3460. The writ may be served by the sheriff, or by any other person appointed for that purpose, in writing, by

the court or judge by whom it is issued or allowed. If served by any other than the sheriff, he possesses the same power, and is liable to the same penalty for a non performance of his duty, as though he were the sheriff.

SEC. 3461. The proper mode of service is by leaving the original writ with the defendant, and preserving a copy thereof on which to make the return of service.

SEC. 3462. If the defendant cannot be found, or if he have not the plaintiff in custody, the service may be made upon any person having the plaintiff in his custody, in the same manner and with the same effect as though he had been made defendant therein.

SEC. 3463. If the defendant conceal himself, or refuse admittance to the person attempting to serve the writ, or if he attempt wrongfully to carry the plaintiff out of the county or the State, after the service of the writ as aforesaid, the sheriff, or the person who is attempting to serve, or who has served the writ as above contemplated, is authorized to arrest the defendant, and bring him, together with the plaintiff, forthwith before the officer or court before whom the writ is made returnable.

SEC. 3464. In order to make such arrest the sheriff, or other person having the writ, possesses the same power as is given to a sheriff for the arrest of a person charged with a felony.

SEC. 3465. If the plaintiff can be found, and if no one appear to have the charge or custody of him, the person having the writ may take him into custody, and make return accordingly. And to get possession of the plaintiff's person in such cases he possesses the same power as is given by the last section for the arrest of the defendant.

SEC. 3466. The writ of habeas corpus must not be disobeyed for any defects of form or misdescription of the plaintiff or defendant, provided enough is stated to show the meaning and intent of the writ.

SEC. 3467. If the defendant attempt to elude the service of the writ of habeas corpus, or to avoid the effect thereof by transferring the plaintiff to another, or by concealing him, he shall, on conviction, be imprisoned in the penitentiary or county jail not more than one year, and fined not exceeding one thousand dollars. And any person knowingly aiding or abetting in any such act shall be subject to the like punishment.

SEC. 3468. An officer refusing to deliver a copy of any legal process by which he detains the plaintiff in custody, to any person who demands such copy, and tenders the fees therefor, shall forfeit two hundred dollars to the person so detained.

PRECEPT.

SECTION 3469. The court or judge to whom the application for the writ is made, if satisfied that the plaintiff would suffer any irreparable injury before he could be relieved by the proceedings as above authorized may issue a precept to the sheriff, or any other person selected instead, commanding him to bring the plaintiff forthwith before such court or judge.

SEC. 3470. When the evidence aforesaid is further sufficient to justify the arrest of the defendant for a criminal offense committed in connection with the illegal detention of the plaintiff, the precept must also contain an order for the arrest of the defendant.

SEC. 3471. The officer or person to whom the precept is directed must execute the same by bringing the defendant, and also the plaintiff, if required, before the court or judge issuing it, and thereupon the defendant must make return to the writ of habeas corpus in the same manner as if the ordinary course had been pursued.

SEC. 3472. The defendant may also be examined and committed, or bailed, or discharged, according to the nature of the case.

PLEADINGS—TRIAL—JUDGMENT.

SEC. 3473. Any person served with the writ is to be presumed to be the person to whom it is directed, although it may be directed to him by a wrong name or description, or to another person.

SEC. 3474. Service being made in any of the modes hereinbefore provided, the defendant must appear at the proper time and answer the said petition, but no verification shall be required to the answer.

SEC. 3475. He must also bring up the body of the plaintiff, or show good cause for not doing so.

SEC. 3476. A willful failure to comply with the above requisitions, renders the defendant liable to be attached for contempt, and to be imprisoned till a compliance is obtained, and also subjects him to the forfeiture of one thousand dollars to the party thereby aggrieved.

SEC. 3477. Such attachment may be served by the sheriff, or any other person thereto authorized by the judge, who shall also be empowered to bring up the body of the plaintiff forthwith, and has for this purpose the same powers as are above conferred in similar cases.

SEC. 3478. The defendant in his answer must state plainly and unequivocally whether he then has, or at any time has had, the plaintiff under his control and restraint, and if so, the cause thereof.

SEC. 3479. If he has transferred him to another person he must state that fact, and to whom, and the time thereof, as well as the reason or authority therefor.

SEC. 3480. If he holds him by virtue of a legal process or written authority, a copy thereof must be annexed.

SEC. 3481. The plaintiff may demur or reply to the defendant's answer, but no verification shall be required to the reply, and all issues joined therein shall be tried by the judge or court.

SEC. 3482. Such replication may deny the sufficiency of the testimony to justify the action of the committing magistrate, on the trial of which issue all written testimony before such magistrate may be given in evidence before the court or judge in connection with any other testimony which may then be produced.

SEC. 3483. But it is not permissible to question the correctness of the action of the grand jury in finding a bill of indictment, or of the trial jury in trial of a cause, nor of a court or judge when acting within their legitimate province and in a lawful manner.

SEC. 3484. If no sufficient legal cause of detention is shown, the plaintiff must be discharged.

SEC. 3485. Although the commitment of the plaintiff may have been irregular, still, if the court or judge is satisfied from the evidence before them that he ought to be held to bail, or committed, either for the offense charged, or any other, the order may be made accordingly.

SEC. 3486. The plaintiff may also, in any case, be committed, let to bail, or his bail be mitigated or increased, as justice may require.

SEC. 3487. Until the sufficiency of the cause of restraint is determined, the defendant may retain the plaintiff in his custody and may use all necessary and proper means for that purpose.

SEC. 3488. The plaintiff in writing, or his attorney, may waive his right to be present at the trial, in which case the proceedings may be had in his absence. The writ will, in such cases, be modified accordingly.

SEC. 3489. Disobedience to any order of discharge subjects the defendant to attachment for contempt, and also to the forfeiture of one thousand dollars to the party aggrieved, besides all damages sustained by him in consequence of such disobedience.

SEC. 3490. When the proceedings are before a judge, except when the writ is refused, all the papers in the case, including his final order, shall be filed with the clerk of the district court of the county wherein the final proceedings were had,

and a brief memorandum thereof shall be entered by the clerk upon his judgment docket.

NO OTHER CAUSE OF ACTION CAN BE JOINED.

From the very nature of the case no other cause of action can be joined with the proceedings in *habeas corpus*, though our code does not expressly so provide.

Petition for Habeas Corpus.

STATE OF IOWA, *Ex Rel.*, } Held on a charge of larceny,
H . . M . . } Linn Co., Iowa.

To Hon. John Shane, Judge of the District Court, Eighth Judicial district of Iowa.

Your petitioner states that he is restrained of his liberty by D . . . H . . . , Sheriff of Linn County, Iowa, at the county jail of said Linn county; that the cause for such restraint is a warrant of commitment issued by one . . . , a true copy of which is hereto attached and made a part of this petition.

Your petitioner states that said restraint is illegal, and that the illegality of said restraint warrant of commitment, and the proceedings by virtue of which it was issued consists in this, to-wit:

[Here set out the causes.]

A transcript of all the proceedings had in said trial is hereto attached and made a part thereof; that the legality of said imprisonment has not already been adjudged upon in any prior proceeding of this same character, and that the application for the writ of *habeas corpus* has not been, by petitioner or any one in his behalf, made to and refused by any court or judge.

(Or, if such application has been made such fact should be stated with a copy of such prior petition, with the reasons for the refusal attached thereto, must be shown or reasons given for not doing so.)

Wherefore petitioner asks that a writ of *habeas corpus* issue, and on a hearing that he be discharged from custody and such illegal imprisonment. H . . M . .

STATE OF IOWA, }
LINN COUNTY. } ss,

I, H M, being sworn, say that I am the petitioner and applicant for the writ of *habeas corpus* named in the forgoing petition, and that I have heard the same read over, and that the statements therein made are true. H . . M . .

Subscribed and sworn to, &c.

PRECEPT UNDER SECTION 3469.

THE STATE OF IOWA,

To the Sheriff of Linn County:

Whereas, S T has applied to me for a warrant for the body of H M, alleged to be illegally restrained of his liberty by D G, in the county jail, of Linn county, Iowa; and, whereas, it satisfactorily appears to me that the said H M is illegally restrained of his liberty by the said D G, and also that the said H M will suffer irreparable injury before he can be relieved by issuing the ordinary writ of *habeas corpus*:

You are, therefore, hereby commanded that you forthwith take the said H M and bring him before me to be dealt with according to law.

Witness my hand this . . day of . . . 187 . . J . . S . . , Judge, etc.

Notice to District Attorney.

To R. M. Smith, District Attorney of the Eighth Judicial District of Iowa:

You are hereby notified that a writ of *habeas corpus* has been issued by the Hon. John Shane, Judge of the District Court, Eighth Judicial District, to inquire into the cause of the imprisonment of H M, now confined in the jail of Linn county, Iowa, and that said writ is made returnable before the said court (or judge) at the court house, in Marion, on the . . day of . . . , 187 . . , at 8 o'clock, A. M., of said day, when and where you can attend if you think proper.

Dated at, etc.

L . . M . . , Attorney for Plaintiff.

ANSWER.

H . . M . . , Plaintiff, }
 vs. } Answer to *habeas corpus*.
 S . . H . . , Sheriff, &c. }

The undersigned, for answer and return to the writ of *habeas corpus* here annexed, states that before the coming of said writ to him, to-wit: on the . . . day of . . . 187 . . , at . . . , the said H M, named in said writ, was placed in his custody by virtue of a warrant of commitment, issued by one J L, a justice of . . . township, Linn county, Iowa, a copy of which is hereto annexed; that the defendant now holds said H M in custody by virtue of said warrant, and that in obedience to the said writ of *habeas corpus* the body of the said H M is now produced by defendant to be dealt with according to law, as by said writ commanded.

For attachment for contempt in disobeying a writ of *habeas corpus* see "Contempt."

RESTRAINT—WHAT CONSTITUTES.

It is not necessary that the imprisonment or restraint should be close confinement to entitle a party to the writ. Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner in which the restraint is effected. Words may constitute an imprisonment, if they impose a restraint upon the person, and he be accordingly restrained and submits. It may be on the street, and though the party be not put into any prison or house. Whenever a person is deprived of the privilege of thus going when and where he pleases, he is restrained of his liberty, and has a right to inquire if that restraint be illegal and wrongful; whether it be by a jailor, constable, or private individual. A mere moral restraint, however, is not such imprisonment as will entitle the party to a writ. Persons discharged on bail will not be considered as restrained of their liberty so as to be entitled to a writ. Hurd on Habeas Corpus, 2d ed., marginal page, 210; *Com. v. Ridgway*, 2 Ashmead, 247.

BAIL IS A BAR.

The giving of bail by the prisoner waives his right to a writ of *habeas corpus*. Hurd on Habeas Corpus, 2d ed., marginal page, 210; 3 Yeates' Rep., 263; 1 Serg. & R. Pa., 356; McCahon's Kansas, 152.

BAR—WHAT CONSTITUTES FORMER DECISION.

It has been held under the New York courts that the decision on an application for a writ of *habeas corpus* by one judge or court, is a complete bar to another application of the same

party on the same grounds or charges before any other judge or court. *Mercein v. The People*, 25 Wendell, 64; *In the matter of DeCosta*, 1 Park Cr. R., 129; *People, ex rel. Mary Allen, v. D. H. Burnett*, 5 Park Crim. R., 113. This is not, however, the case under the Iowa law; the fact of a previous application having been made is no bar to a second application. Nor under the Wisconsin law. *Ex parte S. M. Booth*, 3 Wis., 145; and the refusal by one judge is no bar. 4 Wis., 522.

FORMER TRIALS AND CONVICTIONS.

The question whether one trial is a bar to a subsequent trial, cannot be inquired into on an application for a writ of *habeas corpus*. Such defense must be made on trial in court. *People v. E. H. Rulloff*, 3 Park Cr. R., 126.

RE-ARREST.

Where the prisoner is brought before a judge having authority to issue the writ, and the judge acquires jurisdiction of the person and the subject matter, a discharge, whether the decision be erroneous or not, being in favor of personal liberty, it is final and conclusive, and he cannot be again arrested for the same crime. *Ex parte Jilz*, 64 Mo., 205.

JURISDICTION—INVESTIGATION LIMITED.

It is said in the case of *Platt v. Harrison, Sheriff*, per WRIGHT, C. J.: "After a conviction by a court having jurisdiction, though the conviction be irregular or erroneous, the party is not entitled to this writ. The judgments and proceedings of another competent court cannot be reviewed upon *habeas corpus*. This we understand to be well settled. *Com. v. Lecky*, 1 Watts, 68; *Case of Yates*, 4 Johns., 317; 2 Kent, 26, 33; *Storer v. The State*, 4 Mo., 614; *Riley's Case*, 2 Pick., 172; *U. S. v. Jenkins*, 18 Johns., 305; *Ex parte Watkins*, 3 Peters, 193; *Johnson v. U. S.*, 3 McLean, 89; 6 Iowa, 80." Yet this decision does not, or cannot apply to all cases arising under a *habeas corpus* proceeding. The general principal of law laid down and the main point must of necessity be, not what the general powers and jurisdiction of a court may be. If it act without authority in the particular case, its judgments and orders are mere nullities, not voida-

ble, but simply void, protecting no one acting under them, and constituting no hindrance to the prosecution of any right. *Elliott v. Peirsol*, 1 Peters U. S., 328; *People, ex rel Tweed, v. Liscomb*, 60 N. Y., 559; 19 Am. Rep., 216. Again it is said in the same case, Am. Reports, on page 218: "If the record shows that the judgment is not merely erroneous, but such as could not, under the circumstances, or upon any state of facts, have been pronounced, the case is within the exception of the statute, and the applicant must be discharged."

JUDGMENTS MERELY ERRONEOUS.

If the judgment is merely erroneous, the court having given a wrong judgment when it had jurisdiction, the party aggrieved can only have relief by writ of error, or other process of review. He cannot be relieved summarily by *habeas corpus*. *People, ex rel. Tweed, v. Liscomb*, 60 N. Y., 211; 19 Am. Rep's, on page 218; 3 Hill, 661; *People v. Nevins*, 1 Hill, 154; *People v. Cassels*, 5 Hill, 164; *People v. Cavanagh*, 2 Park Cr. R., 650; *People v. Shea*, 3 Park Cr. R., 562. So, where there is a dispute as to the facts or evidence in the case, it is a matter of appeal. *People v. McCormack*, 4 Park Cr. R., 9; *People v. Rulloff*, 5 Park Cr. R., 77; 1 Barb., 340; 4 Mo., 614. Where the return shows a detainer under legal process, the only proper points for examination are the existence, validity and present legal force of the process, except where, in commitments for criminal or supposed criminal matters, the court or officer hearing the *habeas corpus* is invested with a revisory or corrective jurisdiction over the court or officer commanding the imprisonment, and with jurisdiction also over the offense or subject matter of the commitment, in which case the facts constituting the grounds of the commitment may be reviewed, and may hear evidence in relation thereto. *State v. Best*, 7 Blackf., Ind., 611; Code of Iowa, 1873, Sec. 3484.

VOID AND VOIDABLE ACTS.

The jurisdiction over the process being only collaterally appellate the *habeas corpus*, as before intimated, cannot have the force and operation of a writ of error or a *certiorari*, nor is it designed as a substitute for either. It does not, like

them, deal with errors or irregularities which render a proceeding voidable only, but with those radical defects which render it absolutely void.

A proceeding defective for irregularity and one void for illegality may be reversed upon error or *certiorari*, but it is the latter defect only which gives authority to discharge on *habeas corpus*. An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceedings, and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner. Illegality is, properly, predicable of radical defects only, and signifies that which is contrary to the principles of law, as distinguished from mere rules of procedure; it denotes a complete defect in the proceeding.

It would be irregular to sentence a man to imprisonment in his absence, where the absence was occasioned by the order of the court pronouncing the sentence.

EVIDENCE—WHEN PRODUCED.

To authorize the removal of a prisoner held on an irregular commitment, the testimony must be produced on the return of the writ or at the hearing. It is too late on a subsequent day when the judge decides to discharge the prisoner. *Matter of Hayward*, 1 Sandf., 701; *Matter of Felter*, 3 Zabriskie, 311. And upon hearing, if the court finds that such tribunal had no jurisdiction to try, convict, or commit, he is entitled to be discharged. *People v. Rawson*, 61 Barb., 619.

BURDEN OF PROOF.

Where the process on its face appears regular the burden of proof is on the prisoner. *Matter of Hayward*, 1 Sandf., 701. And is not confined to the ordinary rules of evidence, but may show his arrest by the best evidence on hand. 1 Sandf., 701; 3 Zabriskie, 311.

ADDITIONAL EVIDENCE.

Additional evidence may be submitted to the judge to show that the prisoner is legally detained. *People v. Richardson*, 4 Park. Cr. R., 656. So where a party was arrested for an assault and attempt to commit great bodily injury, and was

taken before a justice of the peace, waived examination, was bound over, and afterward applied for and obtained a writ of *habeas corpus* to bring him before the judge, claiming to be unlawfully imprisoned, and the judge at the hearing of the case refused to hear other testimony than that which was shown by the records of the justice, it was held, under the Code, Sec. 3482, that the judge should have admitted the other testimony offered by the petitioner. *Cowell, appellant, v. Patterson*, Western Jurist, December No., 1878, page 743. It would be illegal to sentence him to imprisonment for a crime which was punishable by a pecuniary fine only. Where a justice of the peace, having power to fine or imprison for a limited time, adjudged the defendant to pay a fine and stand committed until paid, the judgment was held void. The imprisonment being indefinite, was beyond the jurisdiction of the justice. Hurd on Habeas Corpus, marginal pages 326, 327, 328, 329; 4 Wis., 522. So it would be clearly illegal to arrest a person and try him before a justice or inferior court, though on a charge of which such officer had jurisdiction, but without an information, or refusing him the right to time for witnesses, or aid of counsel, or to convict him on a charge of which the officer had no jurisdiction of the subject matter. Ib. To the effect that a writ or proceedings cannot be converted into a writ of error. *Ex parte Holeman*, 28 Iowa, 88.

CORRECTIVE JURISDICTION.

A superior court, in the exercise of its revisory jurisdiction, may discharge a prisoner held under criminal process where the commitment is voidable only, or where the grounds of commitment are insufficient, as under the laws of Iowa the court has power, on the hearing of the application, to receive additional evidence, and upon a full hearing may discharge, recommit, or admit to bail. Hurd, 348; *People v. Richardson*, 4 Park. Cr. R., 656.

AFTER INDICTMENT.

The finding of an indictment precludes, as a general thing, all inquiry as to the guilt or innocence of the accused, whether with a view to discharge or bail. Hurd, page 436; Morris, 407; *The People v. Martin*, 1 Park Cr. R., 187.

NEAREST COURT.

Under section 3452, Code of Iowa, where the mother, residing in one judicial district, made application to the judge of that district for a writ for the possession of her daughter, a minor, alleged to be restrained of her liberty in another judicial district, it was held that the person restrained was the applicant, within the meaning of the law, and that the application should have been made to the judge or court nearest to her (the minor restrained). *Thompson v. Oglesby*, 42 Iowa, 598. So, where the party restrained is out of the State, it is questionable whether the court can issue a writ to run into another State, or compel a party to produce such non-resident. 15 Mich., 417.

FEDERAL AND STATE COURTS.

The State courts have concurrent jurisdiction with the Federal courts to inquire into the validity of an enlistment with the army of the United States. *Ex parte Anderson*, 16 Iowa, 595. *In Matter of Wm. Reynolds*, 6 Park Cr. R., 276.

MILITARY OFFENCES.

Where the return to a writ of *habeas corpus* shows that the prisoner is held to answer to a charge of the military crime of desertion, of which the military courts of the United States have exclusive jurisdiction, the court will not inquire into the validity of his enlistment, but will remand him for trial by the court which has jurisdiction of the offense. *Ex parte Anderson*, 16 Iowa, 595.

FEDERAL CONCURRENT WITH STATE.

A person who is held in custody under an order issued by a court of the United States, in the regular course of procedure, is not entitled to be released on a writ of *habeas corpus* issued by a State court. A State court has no right to thus interfere with the proceedings and process of a Federal court. *Ex parte Holman et al.*, 28 Iowa, 88; *United States v. S. P. Doss and et al.*, 11 Am. Law Register, N. S., 320; *Matter of Spangler*, 11 Mich., 298; *Ex parte Le Bur*, 49 Cal., 159; 1 Hawley's Am. Cr. R., 241.

CONCURRENT WITH STATE COURTS.

Where the Federal and State courts have concurrent jurisdiction of the same offense the government which first assumes jurisdiction will retain it until final judgment. *United States v. S. P. Doss et al.*, 11 Am. Law Register, N. S., 320.

U. S. SUPREME AND CIRCUIT COURT.

The United States Supreme Court has jurisdiction to inquire into and examine the proceedings of the United States Circuit Court. *United States v. Hamilton*, 3 Dallas, 17; *Burford's Case*, 3 Cranch, 448; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Watkins*, 3 Peters, 193; 7 Peters, 568; *Ex parte Metzger*, 5 How., 176; *Ex parte Kaine*, 14 How., 103; *Ex parte Wells*, 18 How., 307; *Ex parte Milligan*, 4 Wall., 2; *Ex parte McCardle*, 6 Wallace, 318; 7 Wallace, 506; *Ex parte Yerger*, 8 Wall., 85; *Ex parte Lange*, 18 Wall., 163; 2 Green Cr. R., 103.

VOID JUDGMENTS.

It is a well settled rule in jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings in the former are relied upon, and brought before the latter by a party claiming the benefit of such proceeding, and this applies to judgments of all courts. If a judgment and acts are without authority, its judgments and orders are nullities; they are not voidable, but simply void. Hurd, page 157, marginal page, 168; *Williamson v. Berry*, 8 Howard, M. S., 540. On commitments by final process upon summary convictions, it has long been the practice to examine on *habeas corpus* the record of conviction, and if void to discharge the prisoner. *Regina v. Chancey*, 6 Dowl P. C., 281; 1 Cow., 144; 12 Wend., 229; 2 Pick., 172.

ILLEGAL ARREST ON LEGAL WARRANT.

Where the warrant is legal but the party illegally arrested upon it, see *Pleasant's Case*, 11 Am. Jurist, 257; *Ex parte Beeching*, 6 Dowl. and R., 209; *McLeods Case*, 25 Wendell, 572; *State v. Ward*, 3 Halst. R., 120; *People v. Martin*, 1 Park. Cr. R., 195.

COLOR OF OFFICE.

Where the incumbent of an office holds it by color of right, though he is not an officer *de jure*, his right will not be inquired into on *habeas corpus*. *Ex parte Strahl*, 16 Iowa, 369; *Ex parte Walker*, 3 B. Monr., 166; *Wilcox v. South*, 5 Wend., 235; *Anlamier v. The Governor*, 1 Texas, 653; *Douglass v. Wickie*, 19 Conn., 489; *Matter of Walker*, 3 Barb., 162; *Sheean's Case*, 122 Mass., 445; 22 Am. R., 374; *State v. Bloom*, 17 Wis., 521; *Ex parte Strong*, 21 Ohio, St., 610.

PARENT AND CHILD.

Where a child has, by permission of her parents, resided for a certain time with others, who seek to detain her after the expiration of the time and with whom she prefers to remain, it was held that while the wishes of the child should not be disregarded, yet the controlling consideration should be the best interest of the child, with due regard to the natural right of the father. *Ex rel Shaw v. Nachtwey*, 43 Iowa, 653; Hurd, 536.

PRACTICE AND PLEADING.

Where the question is purely a legal one the court may reverse or affirm the judgment or order below, or may render such judgment or order as the inferior court or judge should have done, according as it may think proper. *Ex rel Shaw v. Nachtwey*, 43, Iowa, 659.

APPLICATION—SUFFICIENCY OF.

The statute contemplates a statement of facts in the application on its face for a writ of *habeas corpus*, not mere conclusions of law, so that the court may judge as to whether a case is stated. *Ex parte Nye*, 8 Kansas, 99; *In re Martin v. Gregg*, 15 Wis., 479; 16 Wis., 423; 7 Cush., Mass., 285.

DEFENSE—CONTEMPT—PEACE OFFICERS.

A peace officer cannot refuse to answer questions touching his knowledge of the places where liquors are being sold in violation of law, on the ground that he would criminate himself. *Hunt v. McCalla, Sheriff*, 20 Iowa, 20.

Every court is sole judge in matters of contempt of its

orders of authority, and where a court having jurisdiction of a cause is proceeding to arrest a party for contempt, no other court can intermeddle with or stay the proceeding, or on *habeas corpus* release the party who is being proceeded against. *Ex parte Holman*, 28 Iowa, 88; *Ex parte Grace*, 12 Iowa, 206; *Robb v. McDonald*, 29 Iowa, 330, 4 Am. R., 211.

RETURN OF WRIT NOT CONCLUSIVE.

The return to the writ of *habeas corpus* is not conclusive, for if it were so A might be restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice. 1 Wheeler's Cr. R., 329. But where the petitioner is held by virtue of a commitment fair on its face, charging him with contempt of court in refusing to give evidence, it is competent for him to go behind the commitment, and show that the court had no jurisdiction of the proceeding in which he was called as a witness. *Matter of Morton*, 10 Mich., 208; *Matter of Hall*, 10 Mich., 210.

APPEALS.

An appeal lies from an order of the county court overruling a motion to dismiss further proceedings under a writ of *habeas corpus*. *Smith v. Bigelow*, 19 Iowa, 459.

DOES NOT LIE TO SUPREME COURT FROM ONE OF THE MEMBERS OF THAT COURT.

An appeal to the Supreme Court does not lie from a decision or order of the judges thereof, in a *habeas corpus* proceeding. *In re Curley*, 34 Iowa, 184.

SENTENCE—MODIFICATION ON HEARING.

Where a prisoner confined under an illegal sentence is brought before the court on *habeas corpus*, he must be discharged, and the court has no power to correct the sentence or to remand the prisoner to the trial court to be sentenced afresh. *State v. Gray*, 37 N. J., 368; *Rex v. Ellis*, 5 Barn & Cress, 395. So in *King v. Bourne*, 7 Ad. & Ellis, 58, the court refused, when an improper judgment was given below, to pronounce such judgment as should have been given, or to remit the case to the court below for judgment, on the ground that they had no such power. This was undoubtedly the English rule until otherwise regulated by statute, and it

has been generally recognized as authority in this country. *Shepherd v. Commonwealth*, 2 Metc., 419.

Where the judgment below was erroneous Chief Justice Shaw cited the English cases, and held that he could not render a new judgment, or send the case to the court below for judgment. The judgment was, therefore, reversed, and the prisoner discharged, as had been done in the English cases. *Stevens v. Commonwealth*, 5 Metc., 530; *Danieli v. Commonwealth*, 7 Barr, Penn., 375. If a wrong judgment be given against a defendant, which is reversed on error, the court of review can neither give a new judgment against him, nor send the case back to the court below for a proper judgment. *People v. Taylor*, 3 Denio, 91. In *Shepherd v. People*, 25 N. Y., 406, and *Ratsky v. People*, 29 N. Y., 132, the Court of Appeals cited the case in Denio with approbation, and held that it was only by force of their subsequent statute that the rule was changed in 1836, and say: "In this State (N. J.), there is no positive law regulating this subject, no has this question, so far as I am informed, been discussed in our courts, and I therefore, would feel constrained to follow the almost unbroken current of decisions by judges of eminent ability, if the precise point determined in those cases was now under consideration. The writ of *habeas corpus* in this case does not bring up the record of the proceedings and judgment below for review; it operates on the body of the defendant, and raises the single question whether he is legally in custody." Per Van Syckel, J., 37 N. J., 368; 1 Am. Cr. R., Hawley, 554. So it is held that where a prisoner was sentenced to pay a fine *and* be imprisoned for a certain time, where the law under which the conviction was had *only* provided for a fine *or* imprisonment, and the court afterward changed its sentence, that the court had no power to change or modify its sentence and the judgment was void and the prisoner discharged on *habeas corpus*. *Ex parte Lange*, 18 Wallace, 125; 2 Green's Cr. R., 102. Neither is there any provision made under the Iowa law giving the court or judge the power on *habeas corpus* to modify or change the sentence, where the only question is as to whether the restraint is legal or not, by reason of some defect or irregularity in the

proceedings of the trial judge or magistrate, but can only discharge or remand; and the language used in section 3485, Code of 1873, "Although the commitment of the plaintiff may have been irregular, still if the court or judge is satisfied from the evidence before them that he ought to be held to bail, or committed, either for the offense charged, or any other, the order may be made accordingly," only applies where the evidence is certified up, or on hearing where evidence is introduced on a question as to the sufficiency of the testimony.

IMPEACHMENT.

SECTION 4546. An impeachment is the written accusation of a State officer by the House of Representatives before the Senate, of any misdemeanor or malfeasance in office.

SEC. 4547. A majority of all the members of the House of Representatives elected must concur in an impeachment.

SEC. 4548. The impeachment must specify the offenses charged with the same precision as is requisite in an indictment, and the accused must be allowed counsel as in cases of other prosecutions.

SEC. 4549. If the impeachment charge more than one misdemeanor or act of malfeasance, they shall be stated separately and distinctly.

SEC. 4550. When possessed of an impeachment, the Senate must forthwith cause the person accused to be brought before it.


SEC. 4551. All writs and process must be issued by the Secretary of the Senate, and tested in his name, and may be served by any person thereto authorized by the Senate or President.

SEC. 4552. Upon the appearance of the person impeached, he is entitled to a copy of the impeachment, and to a reasonable time in which to answer the same.

SEC. 4553. Before proceeding to the trial, an oath, truly and impartially to try and determine the charge in question according to the evidence, shall be administered by the Secretary of the Senate to the President, and by him to each of the members of that body.

SEC. 4554. Every officer impeached shall be suspended from the exercise of his official duties until his acquittal.

SEC. 4555. If the President of the Senate be impeached, notice thereof must be immediately given to the Senate; which shall thereupon choose another President, to hold his office until the result of the trial is determined.



Section 19, Article III, Legislative Department, Constitution of Iowa, has the following in regard to impeachments:

"The House of Representatives shall have the sole power of impeachment, and all impeachments shall be tried by the Senate. When sitting for that purpose, the Senators shall be upon oath or affirmation; and no person shall be convicted without the concurrence of two-thirds of the members present."

By impeachment is meant the presentment by a body of men, as the House of Representatives of the General Assembly, representing the State which is supposed to have been injured, and is made in writing under the name of "Articles of Impeachment." A tribunal is considered a court of justice, not the ordinary court, but a court composed of the members of the House of Representatives. It may entertain a presentment for any crime, whether it be a felony or misdemeanor, and may attach to conviction the ordinary punishment. The right of impeachment is not confined to a particular county as an indictment; but the House of Representatives may present cases arising anywhere within the State. The effect of an impeachment, like that of an indictment, is simply that there is apparent reason to believe that there has been a criminal violation of the laws by the individual to be impeached. He may be arrested and held in custody or required to give security. The law, however, presumes his innocence, and can do no more than to take such steps as may be necessary to render his attendance at the trial certain. The trial must be conducted in accordance with the rules of evidence observed in the ordinary courts. A proceeding by impeachment is purely judicial. A full and elaborate discussion of the law in relation to impeachments and trials may be found as written by Prof. Dwight, in 6 Am. Law Reg., 257. Also, a very able article written by Judge Wm. Lawrence, of Ohio, on the same subject, will be found on page 641 of same volume, September, 1867. Also, see Cooley's Constitutional Limitations, 3d ed., 1874, page 160 and note. Under the New York Constitution of 1846, Art. VI, Sec. 1, the court for impeachment consisted of Senators and Judges of the Court of Appeals. The Constitution of the United States provides, in respect to those who hold office under it, that judgments in

cases of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States. But the party convicted shall, nevertheless, be liable and subject to indictment according to law. 1 Bishop Cr. Law, 4th ed., Sec. 916.

Articles of impeachment may be presented in the following form:

Articles exhibited by the House of Representatives of the State of Iowa, in the name of themselves and all the people of the State of Iowa, against A G, Governor of the State of Iowa, in maintenance and support of their impeachment against him for high crimes and misdemeanors in office:

That said A G, Governor of the State of Iowa, unmindful of the high duties of his office, and of his oath of office, on the . . . day of . . . , in the year of our Lord, . . . , at Des Moines, in the State of Iowa, did unlawfully conspire with one E H, by fraud and deceit, to receive certain monies as a bribe, from said E H, to-wit: the sum of one thousand dollars, as pay and compensation for the purpose of vetoing a certain bill which was passed by the General Assembly on the . . . day of . . . , entitled "An act for the suppression of intemperance," which was presented, and at that time, before the said A G, as Governor, for his signature; which said sum of one thousand dollars the said A G received and accepted for the express purpose of vetoing said bill, and that the said A G was then and there, on the said day, the duly elected and qualified Governor of the State of Iowa. By reason of which acts he, the said A G, did then and there, as aforesaid, commit, and was guilty of, the crime of "receiving a bribe," contrary to, and in violation of, law.

Form of subpoena to be issued on the application of the managers of the impeachment, or of the party impeached, or of his counsel.

To *Greeting:*

You, and each of you, are hereby commanded to appear before the Senate of the State of Iowa, on the . . . day of . . . , at the Senate Chamber, in the city of Des Moines, then and there to testify of your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached A G. Fail not.

Witness and presiding officer of the Senate, at the City of Des Moines, this . . . day of . . . , A. D. . . . , and of the State of Iowa the . . .

Secretary of State.

Form of oath to be administered to the members of the Senate sitting in the trial of impeachment.

I solemnly swear (or affirm) that in all things appertaining to the trial of the impeachment of A G, now pending, I will do impartial justice, according to the Constitution and laws; so help me God.

Form of summons to be issued and served upon the person impeached.

Whereas, the House of Representatives of the State of Iowa, did, on the . . . day of . . . , exhibit to the Senate articles of impeachment against you, the said A G, in the words following: [Here insert charge.] And demand that you, the said A G, should be put to answer the accusations as set forth in said articles, and that such proceedings, examinations, trials and judgments might be thereupon had as are agreeable to law and justice:

You, the said A G, are therefore hereby summoned to be and appear before the Senate of the State of Iowa, at their chamber, in the City of Des Moines, on the . . . day of . . . , at twelve o'clock and thirty minutes after noon, then and there to answer to said articles of impeachment, and then and there to abide by, obey,

and perform such orders, directions, and judgments as the Senate of the State of Iowa shall make in the premises, according to the Constitution and Laws of the State of Iowa. Hereof you are not to fail.

Witness, and presiding officer of the said Senate, at the City of Des Moines, this . . . day of . . . , A. D. . . ., and of the State the . .

Form of precept to be indorsed on said writ of summons.

THE STATE OF IOWA: 53.

The Senate of the State of Iowa, to greeting:

You are hereby commanded to deliver to, and leave with, if conveniently to be found, or, if not, to leave at his usual place of abode, or at his usual place of business, in some conspicuous place, a true and attested copy of the within writ of summons, together with a like copy of this precept; and in whichever way you perform the service, let it be done at least . . . days before the appearance day mentioned in said writ of summons. Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in the said writ of summons.

Witness, and presiding officer of the Senate, at the City of Des Moines, this . . . day of . . . , A. D. . . ., and of the State the . .

All process shall be served by the Sergeant-at-Arms of the Senate, unless otherwise ordered by the court.

By constitutional provisions all articles of impeachment are to be preferred by the House, and the trial had by the Senate. *State of Kansas v. Adams and Hillyer*, 2 Kan., 17.

The House of Representatives need not be in session nor in attendance during the trial of impeachment by the Senate. *Ib.*

INDICTMENT—FORM AND REQUISITES.

SECTION 50. This repeal of existing statutes shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time when such repeal takes effect; but the proceedings in such cases shall be conformed to the provisions of this Code as far as consistent.

SEC. 4295. An indictment is an accusation in writing found and presented by a grand jury, legally convoked and sworn, to the court in which it is empaneled, charging that a person therein named has done some act, or been guilty of some omission, which, by law, is a public offense punishable on indictment.

SEC. 4296. The indictment must contain:

1. The title of the action, specifying the name of the court to which it is presented, and the name of the parties;

2. A statement of the facts constituting the offense, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

SEC. 4297. It may be substantially in the following form:

District Court of the county of.....

The State of Iowa, }
 against
 A. B. }

The grand jury of the county of....., in the name and by the authority of the State of Iowa, accuse A B of the crime of (here insert the name of the offense, if it have one, such as treason, murder, manslaughter, robbery, larceny, or the like, or if it have no general name, then a brief general description of it as given by law, such as "mingling poison with food, with intent to kill a human being"), committed as follows:

The said A B, on the first day of January, A. D. 187., in the county as aforesaid (here insert the act or omission constituting the offense).

.....District Attorney,
 of the....judicial district

SEC. 4298. The indictment must be direct and certain as regards:

1. The party charged;
2. The offense charged;
3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.

SEC. 4299. When a defendant is indicted by a fictitious or erroneous name, and in any subsequent stage of the proceedings before execution, his true name is discovered, an entry shall be made in the record of the proceedings, of his true name, referring to the fact of his being indicted by the name mentioned in the indictment, and the subsequent proceedings shall be in the true name, substantially as follows:

The State of Iowa, }
 against
 A B, indicted by the name of C D. }

SEC. 4300. The indictment must charge but one offense, but it may be charged in different forms to meet the testimony, and if it may have been committed in different modes and by different means, the indictment may allege the modes and means in the alternative; *provided*, that in case of compound offenses, where in the same transaction more than one offense has been committed, the indictment may charge the several offenses, and the defendant may be convicted of any offense included therein; *provided further*, that this section shall in no manner affect any provision of this Code providing for the suppression of intemperance.

SEC. 4301. The precise time at which the offense was com-

mitted need not be stated in the indictment, but it is sufficient if it allege that the offense was committed at any time prior to the time of the finding thereof, except where the time is a material ingredient in the offense.

SEC. 4302. When an offense involves the commission of, or an attempt to commit, an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the name of the person injured, or attempted to be injured, is not material.

SEC. 4303. The words used in an indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

SEC. 4304. Words used in a statute to define a public offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used.

SEC. 4305. The indictment is sufficient if it can be understood therefrom:

1. That it was found by a grand jury of the county empaneled in the court having authority to receive it, though the name of the court is not actually stated;

2. That the defendant is named, or, if his true name is unknown to the grand jury, that fact be stated, and that he be described by a fictitious name;

3. That the offense was committed within the jurisdiction of the court, or is triable therein;

4. That the offense was committed at some time prior to the time of the finding of the indictment;

5. That the act or omission charged as the offense, is stated with such a degree of certainty, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment upon a conviction according to the law of the case;

6. That when material, the name of the person injured, or attempted to be injured, be set forth when known to the grand jury, or if not known to it, that it be so stated in the indictment.

SEC. 4306. No indictment is sufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of any of the following matters, which were formerly deemed defects or imperfections:

1. For the want of an allegation of the time or place of any material fact, when the time and place have been once stated;

2. For the omission of any of the following allegations, namely: "with force and arms," "contrary to the form of

the statutes," or "against the peace and dignity of the State;"

3. For the omission to allege that the grand jury was empaneled, sworn or charged;

4. For any surplusage, or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged; nor,

5. For any other matter which was formerly deemed a defect, or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits.

SEC. 4307. Neither presumptions of law nor matters of which judicial notice is taken, need be stated in an indictment.

SEC. 4308. In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, the facts conferring jurisdiction need not be stated in the indictment, but it is sufficient to state that the judgment or determination was duly made, or the proceedings duly had, before such court or officer; but the facts constituting the jurisdiction must be established on the trial.

SEC. 4309. In pleading a private statute, or right derived therefrom, it is sufficient to refer to the same by its title and the day of its approval, and the court must thereupon take judicial notice thereof.

SEC. 4310. An indictment for a libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter upon which the indictment is found, but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on the trial.

SEC. 4311. When an instrument which is subject of an indictment, has been destroyed or withheld by the act of procurement of the defendant, and the fact of such destruction or withholding is alleged in the indictment and established on the trial, the misdescription of the instrument is immaterial.

SEC. 4314. The distinction between an accessory before the fact and a principal, is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet its commission, though not present, must hereafter be indicted, tried, and punished as principals.

SEC. 4315. An accessory after the fact to the commission of a public offense, may be indicted, tried, and punished, though the principal be neither tried nor convicted.

SEC. 4316. A person may be indicted for having, with the knowledge of the commission of a public offense, taken money or property of another, or a gratuity or reward, or

engagement or promise therefor, upon agreement or understanding, express or implied, to compound or conceal the offense, or to abstain from a prosecution therefor, or to withhold any evidence thereof, though the person guilty of the original offense has not been indicted or tried.

What is said of indictments applicable to particular crimes, will be found under the different heads in their respective order; and what is said here, applies to indictments generally.

INDICTMENT—MOTION TO SET ASIDE.

By subdivision 5 of section 4337, Code 1873, the fact "that the grand jury were not selected, drawn, summoned, impaneled or sworn as required by law," constitutes ground to set aside an indictment on motion, but section 4339 provides that this ground of motion to set aside an indictment "is not allowed to a defendant who has been held to answer before indictment" for the reason as clearly announced in the opinion by Kinney, J., commencing at the bottom of page 517, in the case of *Norris House v. State*, 3 G. Greene, "or to an individual juror, for any cause of challenge after they are sworn." Section 2890, Code 1851, which is the same as Section 4337 Code 1873, in its application, must be confined to such defendants as had an opportunity of interposing an objection, viz: To such persons as were bound over to answer a criminal charge or awaited in custody. As they have an opportunity of objecting to the grand jury, or an individual juror, before they are sworn, if they do not, at the proper time, they are forever barred from objecting afterwards. But this cannot be said of persons who are in no manner charged with a criminal offense, and who could not anticipate that charges would be preferred against them. This decision is sustained by adjudications since. *State v. Davis*, 2 Ired., 153, 160, 161; *State v. Clarissa*, 11 Alabama, 57; *State v. Martin*, 2 Ired., 101; *State v. Seaborn*, 4 Devereux, 305; *People v. Griffin*, 2 Barbour, 427; *Fenalty v. State*, 7 English, 630; *State v. Borroum*, 25 Mississippi, 203; *State v. Howard*, 10 Iowa, 101; *State v. Ingalls*, 17 Iowa, 8; *State v. Wood*, Ib., 18; *State v. Ostrander*, 18 Iowa, 435; *State v. Gibbs*, 39 Iowa, 319.

ALIEN JUROR—CAUSE FOR SETTING ASIDE INDICTMENT.

The same rule of law applies where one of the jurors was an alien. The objection should have been made before the jury was sworn, where defendant was held to answer, *State v. Gibbs*, 39 Iowa, 319.

MURDER—JOINT INDICTMENT.

In a joint indictment for murder, it is not necessary that the instrument shall distinguish between the principal and the accessory, where both are charged with intent to kill. *State v. Zeibart*, 40 Iowa, 169.

FORM PRESCRIBED BY CODE HELD SUFFICIENT.

The form as set out in section 4297, Code of 1873, which is the same as section 4651, Revision of 1860, is approved. *State v. Winstrand*, 37 Iowa, 110.

NAME OF OFFENSE—CHARGING PART IMMATERIAL—SURPLUSAGE.

The name of the offense or the charging part of the indictment does not govern. Where the indictment charges, as the name, one crime, and the statement of the facts make it another, this does not vitiate the indictment, but the name is deemed surplusage. For instance, where the indictment charged as a name of the crime manslaughter, and the statement of facts defined the crime of murder, the defendant was properly tried for murder. *State v. Davis*, 41 Iowa, 311.

FAILURE TO GIVE ANY NAME TO THE OFFENSE.

Where an indictment states the facts constituting the offense, but does not name it by any technical name, the indictment is held to be good, although not named. *State of Iowa v. Hessenkamp*, 17 Iowa, 25. It is also said in *State v. Baldy*, 17 Iowa, 39: "It may be the better practice to name the offense in the indictment; a failure to do so will not render it vulnerable to a demurrer or other objections." So, where the name of the offense is not correctly charged, but the charging part did correctly define the offense, the indictment was held good. *State of Iowa v. Ansaime*, 15 Iowa, 44. And in *State v. Shaw*, 35 Iowa, 575, where the indictment charged the offense by the name of "nuisance," but the facts alleged as constituting the crime, defined another offense,

it was held that the indictment was good, for the offense defined therein, and the name given to it were mere surplusage, and should have been disregarded. Code 1873, section 4306, Sub., 4; *State v. Davis*, 41 Iowa, 311.

SIMPLY NAMING THE OFFENSE NOT SUFFICIENT.

The simply naming of the offense in the introductory and concluding portions of the indictment is not sufficient, unless the facts charged constitute it such. *State v. Hagan*, 10 Ohio, 459; *State v. Fouts*, 8 Ohio St., 98; *State v. McCormick*, 27 Iowa, 413.

DUPPLICITY—CHARGING TWO OFFENSES.

To charge that the defendant burned a stack of hay, and on the same day a building, is bad, for duplicity in charging two offenses. *State v. Fidment*, 35 Iowa, 541; Code of 1873, section, 4300, Revision, 4654.

DUPPLICITY, CHARGING TWO OFFENSES IN ONE COUNT.

Where two or more independent offenses are joined in the same count, it is bad for duplicity and demurrable on that ground. *State v. Fidment*, 35 Iowa, 541; *State v. Burgess*, 40 Maine, 592, 594; *State v. Palmer*, 35 Maine, 9; 1 Bishop Cr. Pr., sections 189, 193; 2 Green Cr. R., 462; *People v. Wright*, 9 Wendell, 193; 8 N. H., 163.

ELECTION BY PROSECUTOR.

Where an indictment is bad for duplicity, in charging two offenses, and the defendant does not assail it on that ground, he may, nevertheless, require the prosecutor to elect upon which charge he will proceed. *State v. McPherson*, 9 Iowa, 53; *State v. Fidment*, 35 Iowa, 541; *State v. Abrahams*, 6 Iowa, 119; *People v. Johnson*, 2 Wheeler's Cr. Cases, 361.

MUST CHARGE BUT ONE OFFENSE.

As a general principle of law, an indictment must not charge more than one offense. Section 4300, Code, 1873, Revision, 1860, section 4654; *State v. McPherson*, 9 Iowa, 54; *State v. Baughman*, 20 Iowa, 500; *State v. Smith*, 31 Maine, 386; 2 Green Cr. R., 462. To this rule there are, however, exceptions, and cases that do not come under that rule; for instance, liquor cases, under the Iowa law. The latter part

of section 4300 reads, "this section shall in no manner affect any provision of this Code providing for the suppression of intemperance." The same was incorporated in the Revision of 1860; also, in cases of compound offenses where, in the same transaction, more than one offense has been committed. To charge, "did keep and owned liquors, to sell," does not charge two offenses under the statute. *State v. Vaughn*, 5 Iowa, 369; *State v. Walters*, Ib., 507. So, to charge an "assault and battery," is not charging a double offense. *State v. Benham*, 1 Iowa, 542; *State v. Twogood*, 7 Ib., 253. So, to charge "uttering, passing, and tendering in payment a counterfeit bank bill," is not bad. *State v. Barrett*, 8 Iowa, 536. All authorities agree that an indictment may set out and charge in different counts and forms an offense to meet the testimony. The prosecutor cannot be compelled to elect, where several counts are introduced, solely for the purpose of meeting the evidence, as it may transpire, the charges being substantially for the same offense, for the purpose of meeting every contingency in the evidence; and this is always permissible. *State v. McPherson*, 9 Iowa, 54; *Com. v. Birdsall*, 69 Pa. St., 482; 1 Green Cr. R., 621; *People v. Austin*, 1 Park., Cr. R., 154; *People v. Nelson*, 5 Park. Cr. R., 39; 6 Park. Cr. R., 209, 386, 488; *State v. Cooster*, 10 Iowa, 453; *State v. Watrous*, 13 Iowa, 494; *State v. Baughman*, 20 Iowa, 498; *State v. Engleman*, 2 Carter, Ind., 91; *Rex v. Jones*, 8 Carr & P., 776; *Rex v. Trueman*, Ib., 727; 2 McLean, 325; *Com. v. Coulter*, 5 Met., 532; 7 Blackford, 186; *State v. Nelson*, 29 Maine, 324; *Com. v. Griffin*, 21 Pick., 523; *People v. Costello*, 1 Denio, 83. It is said in *People v. Reynolds*, that there would be an incongruity in incorporating two or more offenses in one indictment, as for instance, forgery and perjury, cannot be denied; but when offenses of the same character, differing only in degree, are united in the same indictment, the prisoner may, and ought to be tried on both charges, at the same time. *People v. Rynders*, 12 Wendell, 427; also, see *People v. Baker*, 3 Hill, 159; *People v. McKinney*, 10 Mich., 54, 95; *People v. VanSickle*, 29 Ib., 63. Where the same section of a statute makes two or more distinct acts, connected with the same transaction indictable, each one of which may be considered as represent-

ing a stage in the same offense, they may usually be coupled together, not only in the same indictment, but in the same count. 1 Wharton Cr. Law, 6th ed., section 390; 2 Ib., section 1466; *State v. Morton*, 27 Vt., 310; *Com. v. Twichell*, 4 Cush., 74; *Com. v. Edge*, 7 Barr, 275; *State v. Slickee*, 13 Ark.; 8 Eng., 397; *State v. Perkins*, 42 N. H., 364; *State v. Stoughton*, 2 Ohio St., 562; *State v. Mackey*, 3 Ohio St., 363. Overruling, *State v. Kirby*, 1 Ohio St., 185; *State v. Hasting*, 53 N. H., 452.

TIME AND PLACE STATED IN FIRST COUNT NEED NOT BE STATED IN SUBSEQUENT COUNTS.

Where there are several counts in an indictment in the first of which the time and place are specifically stated, it is sufficient to allege in the subsequent counts that the offense therein described was then and there committed. *Regina v. Crad-dork*, 2 Denison C. C., 21; *Regina v. Waverton*, 2d Leading Cr. Cases, 112. *State v. Evans*, 24 Ohio St., 208. Such as stating "on the day and year aforesaid," "town, county and state aforesaid, etc." *People v. Graves*, 5 Park. Cr. R., 134.

EACH COUNT MUST BE A COMPLETE INDICTMENT OF ITSELF.

While it is true that there may be several counts, each count should be complete in itself, that is, so far as the description and charging part of the offense is concerned. *State v. Lea*, 1 Cold., Tenn., 175; *State v. Rice*, 3 Heiskell, Tenn., 215; 1 Green Cr. R., 366.

FORMAL CONCLUSION IN AN INDICTMENT OF SEVERAL COUNTS.

Where the indictment contains several counts, it is sufficient as a formal conclusion to add to the last count against the peace and dignity of the State, etc., and not to each count. *State v. Rice*, 3 Heiskell, 115; 1 Green Cr. R., 366.

SHOULD BE SPECIFIC IN ITS CHARGE.

While the exact words of the statute need not be followed in charging an offense, yet the words used must have the same substantial meaning and import, and the material facts which constitute the offense must be stated with such a degree of certainty in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and the court is to pronounce judgment

upon a conviction according to the law of the case. *State v. Cure*, 7 Iowa, 479; *State v. Middleton*, 11 Ib., 246; *State v. Hessenkamp*, 17 Ib., 25; *State v. Allen*, 32 Ib., 491; Subd. 5, section 4305, Code 1873; Rev. 1860, section 4659; *State v. Conlee*, 25 Iowa, on page 242; *State v. Johnson*, 26 Ib., 407.

STATUTORY LANGUAGE USED IS SUFFICIENT.

Generally an indictment is good which follows the words of the statute upon which it is framed. And many of the authorities go so far as to hold that it is sufficient if the words used in an indictment are equivalent to those of the statute, or of the same substance, to a reasonable intendment. *State v. Bangher*, 3 Blackf., 307; *U. S. v. Wilson*, 1 Bald., 78; *U. S. v. Lancaster*, 2 McLean, 431; *State v. Duncan*, 9 Porter, 260; *State v. Helm*, 6 Miss., 263; *People v. Chambers*, 4 Scam., Ill, 351; *State v. Noel*, 5 Blackf., 548; *State v. Chambers*, 2 G. Greene, 308; *State v. Shaffer*, 21 Iowa, 486; *People v. Thompson*, 3 Park. Cr. R., 208.

STATUTE, REPEAL OF DOES NOT AFFECT INDICTMENTS UNDER PRIOR LAW.

The repeal of a statute does not affect an indictment for an offense committed under a prior law. Section 50, Code of 1873; Rev. 1860, section 34; *State v. Shaeffer*, 21 Iowa, 486.

CLERICAL ERRORS DISREGARDED.

Under section 4302, Code of 1873, Rev. 1860, section 4656, the omission, misspelling or discrepancy of a party's name is no ground of objection material to an indictment. *State v. Emeigh*, 18 Iowa, 123; *State v. Thompson*, 19 Ib., 299; *State v. Raymond*, 20 Ib., 684; *State v. Cunningham*, 21 Ib., 433; *State v. Flynn*, 42 Ib., 164.

VARIANCE—MISSPELLING NAME OF COUNTY OR STATE.

The misspelling of the name of the State as "Sowa" instead of "Iowa," or misspelling as to name of a county, will not prejudice the substantial rights of the defendant. Rev., 1860, Secs. 4653, 4659, 4660; Code, 1873, Secs. 4299, 4302; *State v. Hintermeister*, 1 Iowa, 101; *State v. Gurlock*, 14 Iowa, 444.

DATE—ON OR ABOUT IS DEEMED SUFFICIENT.

The precise time at which the offense was committed need not be stated in the indictment, but is sufficient if it allege that the offense was committed at any time prior to the time of the finding thereof, except where the time is a material ingredient in the offense. Code, 1873, Sec. 4301; Rev., 1860, Sec. 4655; and within the period of the statutory limitation, although a particular time is specified in the indictment. *State v. Layton*, 25 Iowa, 194. In a prosecution for a nuisance (*State v. Layton*, 25 Iowa, 194), where it is averred, as to the date, "on the 15th," it is proper to show that the act was committed on the 1st of the same month. *State v. Curley*. In a prosecution for the violation of the liquor law the time of selling need not be averred nor proved on the trial. *State v. Curley*, 33 Iowa, 359; *People v. Crichton*, 6 Park Cr. R., 365; *State v. Munson*, 40 Connecticut, 475; 2 Green Cr. R., 493; while it is held in *State v. Morgan*, that date must be certain, that on or about is not sufficient. 13 Florida, 671; 1 Green Cr. R., 361.

INDICTMENT.

An indictment must charge the commission of the offense at a date anterior to the presentment of the indictment, and is a positive requirement which must be observed. *Nelson v. State*, 1 Texas Court of Appeals, 556; *Joel v. State*, 28 Texas, 642.

STYLE OF PROCESS.

Article 5, "Judicial Department," section 8, Constitution of Iowa, Code 1873, page 779: The style of all process shall be "The State of Iowa," and all prosecutions shall be conducted in the name and by the authority of the same. It is held that to omit the word "The" State of Iowa, or, in the body of an indictment, "in behalf of said State of Iowa," instead of "in behalf of 'the' State of Iowa," will not vitiate an indictment. *State v. Harriman*, 2 G. Greene, on page 277. *State v. Wrocklege*, 1 Iowa, 168.

FIGURES INSTEAD OF WRITTEN WORDS.

Figures do not vitiate an indictment. Code of 1873, Sec. 4297; *State v. Seamons*, 1 G. Greene, 418; *State v.*

Winfield, 3 G. Greene, 339; *State v. Hodgedon*, 3 Vern., 481; while it was held in *State v. Finch* that words and not figures must be used. *French v. State*, 6 Blackf., 533.

DAY AND DATE.

To allege "on a certain day, and also on divers other days and times," is held good. *People v. Adams*, 17 Wendell, 475.

DEADLY WEAPON—DESCRIPTION OF.

Where the indictment alleged that the assault was committed with a "deadly weapon" it was held to be a sufficient description. *State v. Seamons*, 1 G. Greene, 418. In case of an assault, or assault and battery. *State v. Kruger*, 1 Nebraska, 365.

IN A FELONY INDICTMENT SHOULD ALLEGE THE WEAPON TO BE DEADLY.

If the act is done with a weapon which imports its deadly character, such as a sword, gun or pistol, it would be sufficient to describe it by its name; but in other cases the instrument, or thing used, should be described, and charged to be deadly. *State v. Kruger*, 1 Nebraska, 365.

PROCEEDINGS IN REM—VENUE—DISTINCTION IN PROCEEDINGS AS AGAINST INDIVIDUAL OR BUILDING.

Where the prosecution is directly against an individual for the commission of a crime, committed in a certain building or place, and not against the building or premises directly, it is not necessary to describe the property by local description, but simply the county as the venue. *State v. Crogan*, 8 Iowa, 523; *State v. Kreig*, 13 Iowa, 462; *King v. Taylor*, 3 B. & C., 502; 2 Hill, 558; *State v. Schilling*, 14 Iowa, 456; *State v. Becker*, 20 Iowa, 438.

ALLEGATION OF LOCAL DESCRIPTION IF ALLEGED MUST BE PROVED.

Although an allegation of local description is not necessary in a certain class of cases, yet if alleged the same must be proved. *State v. Crogan*, 8 Iowa, 523; *People v. Slater*, 5 Hill, 401; *Same v. Honeyman*, 3 Denio, 121; *Shaw v. Wrigley*, 2 East, 500; 7 Iowa, 243.

ONE GOOD COUNT SUPPORTS A GENERAL FINDING.

As a general rule one good count will support a general

verdict though some of the counts may be held not good. *State v. Forsyth*, 6 Ohio, 25; *State v. Stoughton and Hudson*, 2 Ohio St., 563; 3 Denio, 97; *People v. Stein*, 1 Park Cr. R., 202, 246; *People v. Gilkinson*, 4 Park Cr. R., 26; *People v. Creighton*, 6 Park Cr. R., 363; 8 Wend., 210; 3 Hill, 198; 1 Johnson, 320; 6 Gray, 274; 6 N. H., 352; 59 N. Y., 122.

AMENDING INDICTMENT AND INFORMATION WRITTEN BY PENCIL, RED OR BLUE INK.

In an information at the suit of the crown, the attorney general is entitled, as a matter of right, to amend the information on payment of costs. *Attorney General v. Ray*, 11 M. & W., 464; 7 Jur., 561; 12 L. J., Exch., 352. So, the adding a word, in pencil mark, before the indictment is found by the grand jury, does not vitiate the indictment. The court observes "there is no statute in Ohio, nor any rule of common law, nor any principle of ordinary sense, that will avoid an indictment merely because one letter in the whole indictment is added to some one word in pencil, but if written in red, blue or yellow ink, who is bold enough to say that it is such a departure from usage that it vitiates the indictment? We apprehend no one." *State v. May*, 14 Ohio, 464. So where witnesses have been omitted on the back of an indictment, it may be corrected. *State v. Flynn*, 42 Iowa, 164; also, generally, Roscoe's Cr. Ev., 7th ed., Sec. 206.

STATUTORY OFFENSES—DESCRIPTION.

When a statute describes an offense by terms constituting rather a legal conclusion than a statement of the facts constituting it, the indictment must specifically describe the offense by a statement of the facts. Thus, in Virginia, under a statute which constituted "attempts" to commit certain offenses "misdemeanors," it was held not sufficient to allege an "attempt to main," in the language of the statute, the particulars of the attempt were required. *Clark's Case*, 6 Gratton, 675; *Commonwealth v. Gillespie*, 7 Serg. & Rawle, 469; *State v. Brandt*, 41 Iowa, 608.

FICTITIOUS NAMES.

To refer to a defendant in an indictment as "a man in Tur-

ner Hall" is not sufficient. It is only where the defendant's name cannot be discovered that it is permitted to the State to describe him by a fictitious name, with the statement that his real name is unknown. *State v. Geiger*, 5 Iowa, 485.

EXCEPTIONS AND PROVISIO AS AN ALLEGATION IN AN INDICTMENT.

Under the Iowa liquor law, where it is illegal to sell intoxicating liquor, "except" those holding a permit, or for mechanical, medical, culinary, and sacramental purposes, and providing for the obtaining a permit, and in section 1555, Code of 1873, provided that nothing in said chapter shall be so construed as to forbid the manufacture and sale of beer, cider from apples, or wine from grapes, currants, or other fruits, grown in this State. See chapter entitled "Prohibitory Liquor Law." It is well settled by adjudicated cases under that law that these exceptions and provisos need not be set out in the information or indictment, nor proved by the State, and not to be within the exceptions. Such is a matter of defense to be set up and proved by the defendant. *State v. Beneke*, 9 Iowa, 204; *State v. Becker*, 20 Iowa, 439; *State v. Curley*, 33 Iowa, 359; *State v. Jordan*, 39 Iowa, 387; *State v. Stapp*, 29 Iowa, 551; *Commonwealth v. Hart*, 11 Cush., 130; 2 Green Cr. R., 251. So under the Kansas law, restraining dram-shops and taverns outside of city limits from selling intoxicating liquors, it was held that the act excepting cities from its operations is not one of those exceptions necessary to be negatived in the indictment. *State v. Thompson*, 2 Kansas, 433. It may be conceded to be a well settled principle of law that where an offense is created by statute, and an exception is made, either by another statute, or by another and substantive or distinct clause of the same statute, or the matter of exception or proviso enter into and become a part of the description of the offense, or a qualification of the language defining or creating it, it is not necessary for the prosecutor, either in the indictment or by evidence, to show that the defendant does not come within the exception, but is a matter of defense. 1 Archbold's Cr. Practice and Pleading, 6th ed., 118; *State v. Stanglein*, 17 Ohio St., 453; *State v. Thompson*, 2 Kansas, 433; *United States v. Cook*, 17 Wallace, 168. And though it be in the same section or succeeding sentence. *Commonwealth*

v. Bean, 14 Gray, 53; *Spiers v. Parker*, 1 Term R., 141; 2 Green Cr. R., 92. The confusion which seems to exist in regard to this rule has arisen from the various modes adopted, the indefinite language used in defining it, and the multiplicity of forms in which qualifications and exceptions are introduced into statutes. The point seems to be, what constitutes the enacting clause, within the meaning of the different decisions. It is said in *State v. Stanglein*, "a negative averment to the matter of an exception or proviso in a statute, is not requisite in an indictment, unless the matter of such exception or proviso enter and become a part of the description of the offense, or a qualification of the language defining or creating it," as by saying that none shall do the act prohibited, except in the cases thereafter excepted. Such is a matter of defense. But where the proviso adds a qualification to the enactment, so as to bring a case within it, but for the proviso, would be without the statute, the exception must be negatived. *Connover v. Porter*, 14 Ohio St., 453; Wharton's Am. Cr. Law, Vol. 1, Secs. 378-9, 7th ed., 379. An act prohibiting gaming, under the Revision of 1859, Sec. 4, page 274, Laws of Iowa, where the act of gambling was prohibited, excepting "games of athletic exercise," it was held that the negative exception in a penal statute need not be set out in the indictment. 4 Hawkins P. C., 67; *State v. Romp*, 3 G. Greene, 276. In *United States v. Cook*, the court held that under the following proviso, "Provided, that nothing herein contained shall extend to any person or persons fleeing from justice" (1 Stat. at Large, 119), it was not necessary to allege the exception in the indictment. 17 Wallace, 168; 2 Green's Cr. R., 88. So, under the laws of Iowa governing the limitation of actions, the period during which the defendant is not within the State shall not be taken as part of the limitation. Sec. 2814, Code of 1851; Sec. 4169, Code of 1873. But this proviso need not be negatived in the indictment. *State v. Hussey*, 7 Iowa, 409. If the language of a section defining an offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately defined, without any such reference to the exception, the pleader may safely omit any such

reference, as the matter contained in the exception is a matter of defense. *Steel v. Smith*, 1 Barn. & Ald., 99; *United States v. Cook*, 17 Wallace, 168. However, if the crime cannot be properly described without the exception, the same should be set out. *State v. Abbey*, 29 Verm., 66. But it is held in some cases that the exception in a limitation act must be averred in the indictment. *State v. Bryan*, 19 La. Ann., 435; *United States v. Watkins*, 3 Cranch C. C., 550; *People v. Miller*, 12 Cal., 294; *State v. McLane*, 4 Geo., 340.

OBSERVANCE OF THE LORD'S DAY—EXCEPTIONS—PLEADINGS.

Under section 4072, Code of 1873, prohibiting the doing of labor, except only works of necessity or charity, on the Lord's day, is clearly within the enacting clause, and such clause cannot be read without reading the exception. In an indictment or information under such sections, it is doubtless necessary to negative the exception; laboring or traveling merely is not forbidden; but for unnecessary labor, not required as a matter of necessity or charity, the absence of necessity or charity is a constituent part of the description of the acts prohibited. *Com. v. Hart*, 11 Couch., 330; 2 Green's Cr. R., 250. To the same effect, *Whitwicks v. Oslaston*, 1 Levinz, 26; 8 Term R., 542; *Thibault v. Gibson*, 12 Meeson & Welsley, 84, 94; *Smith v. Moore*, 6 Greenleaf, 274; *State v. Reynolds*, 2 Nott & McCord, 365; 4 Johnson, 304. The word "except" is not necessary in order to constitute an exception within the rule; the words "unless," "other than," "not being," "not having," &c., have the same legal effect, and require the same form of pleading. 7 Term R., 27; 1 Term R., 141; 1 Leach C. C., 4th ed., 102; *Com. v. Maxwell*, 2 Pickering, 139; *State v. Butler*, 17 Vermont, 145; 1 East P. C., 166, 167; 2 Green's Cr. R., 251. But the latter part of Sec. 4072, Code of 1873, cannot be said to be within this rule, where it refers to that class who conscientiously observe the seventh day of the week as the Sabbath, and others named in the last part of said section; this is not a part of the enacting clause, and is a mere matter of defense for a defendant to establish. So, where a statute provides that whoever, having a husband or wife living, marries another person, "shall except in cases mentioned in the following section, be deemed guilty of polygamy."

Held that an indictment under that statute need not negative the exception. *Com. v. Jennings*, 121 Mass., 47; 23 Am. R., 249.

MUST BE PRESENTED IN OPEN COURT.

Under section 4294, Code of 1873, the grand jury must present this indictment in open court, in presence of the jury, and the same should be filed and placed on record. *State v. Glover and Nevin*, 3 G. Greene, 249; *People v. Rainey*, 3 Gillman, Ill., 72.

INDORSEMENT—TRUE BILL—EVIDENCE OF FINDING.

It is held that the indorsement and signature of the foreman are the evidences of findings of the grand jury, without which the court should never permit the indictment to be entered of record. *People v. Gardner*, 3 Scam., Ill., 83; *People v. McKinney*, 2 Gilman, Ill., 540; 3 G. Greene, 249; *State v. Dixon*, 4 G. Greene, 381; Morris, 332. So an indorsement and record: "A true bill, Sillas C. Pierson, Foreman of the grand jury," presented and filed in open court, in presence of the grand jury, May 24, 1854, with name of clerk, is a sufficient compliance with the law. *State v. Wrocklege*, 1 Iowa, 167. But the failure of the clerk to make indorsement is not sufficient to invalidate the proceedings. So where the indictment was properly indorsed by the foreman as a true bill, but the clerk's entry did not show that it was presented by the foreman in open court in presence of the jury, is not a sufficient cause to set aside the indictment. *State v. Art.*, 6 Iowa, 511; *State v. Shepard*, 10 Ib., 136; *State v. Jolley*, 7 Ib., 15.

**WITNESSES—INDORSEMENT OF NAMES ON BACK OF INDICTMENT—
MISSPELLING OF NAMES.**

Under section 4293, Code of 1873, the names of witnesses examined before the grand jury must be indorsed on the indictment, except for rebuttal. See 10 Iowa, 98; 12 Ib., 284. Yet the misspelling of a name, such as "E. Kimberling" instead of "Kamberling;" "L. H. Mason," instead of "Levi H. Mason;" "Ex-Sheriff Upright, Rockford, Ill.," instead of "Morris J. Wright;" "N. W. Tompkins," instead of "Silas W. Tompkins;" "A. B. Dayton," instead of "Abraham Day-

ton," is not sufficient grounds to prevent the witnesses from testifying, and it may be shown that they are the same persons who testified before the grand jury. *State v. Houston*, 4 G. Greene, 437; *State v. Pierce*, 8 Iowa, 231; *State v. McComb*, 18 Ib., 43; *State v. Stanleg*, 33 Ib., 528; *State v. Flinn*, 42 Ib., 164. However, care should be used to avoid such errors.

INCOMPETENT EVIDENCE NOT SUFFICIENT GROUNDS TO SET ASIDE AN INDICTMENT.

Under Sec. 4337, Sub-div. 4, Code of 1873, the fact of incompetent witnesses appearing before the grand jury is not a sufficient ground to set the indictment aside. The object is to exclude outsiders or spectators from the jury room. *State v. Tucker*, 20 Iowa, 509.

LOST INDICTMENT, EFFECT OF.

Where an indictment is lost and a second one is found, and quashed, or set aside, and the first one is recovered, it is held that the second indictment did not supersede the first. *State v. Reddan*, 4 G. Greene, 137; *State v. Whitmore*, 5 Pick., 247; *People v. Monroe*, 20 Wendell, 108.

MOTION TO SET ASIDE IRREGULARITIES—BURDEN OF SHOWING.

The burden of showing irregularities in an indictment, is on the defendant, and the State is not required to establish, in the first instance, a compliance with the law. *State v. Hartman*, 10 Iowa, 589.

WAIVER OF.

While an indictment may be assailed by motion, for the reason that the witnesses' names are not indorsed on the indictment, and this should be sustained unless corrected by the State, yet if such motion is not made, the witnesses may be examined on trial. *State v. Flynn*, 42 Iowa, 164.

WILL NOT BE SET ASIDE FOR THE REASON THAT AN EXAMINATION IS PENDING BEFORE A MAGISTRATE AT THE SAME TIME.

If an examination is pending before a magistrate, and an indictment also found and presented at the same time, this is not a sufficient cause to quash the indictment. *People v. Hefferman*, 5 Park. Cr. R., 393.

ALLEGATION OF WORD "DID."

An indictment is fatally defective which fails to allege that the accused *did* the acts charged as constituting the offense. *State v. Hutchinson*, 26 Texas, 111; *State v. Dougherty*, 30 Texas, 360; *Edmondson v. State*, 41 Texas, 496; *Ewing v. State*, 1 Texas, Court of Appeals, 362.

SURPLUSAGE.

Allegations that are considered mere surplusage do not vitiate indictments. *People v. Jackson*, 3 Hill, 94; *Lohman v. People*, 1 N. Y., 380; *State v. Hayden*, 45 Iowa, 11; *La Beau v. People*, 6 Park. Cr. R., 361.

DEGREE OF OFFENSES.

It is well settled that in charging the greater it includes all inferior grades of the same nature, such as an assault and battery, includes an assault, or an assault with intent to commit great bodily injury, includes a battery or simple assault, so it is held on a charge for maiming, a conviction might be had for a battery, though the assault or battery is not charged. *Benham v. State*, 1 Iowa, 542; 2 Eng., 374; *Stewart v. State*, 5 Hann., 241; *State v. Kennedy*, 7 Blackf., 233; *White v. People*, 32 N. Y., 465.

AMENDING INDICTMENT.

In case of *State v. Merchant*, 38 Iowa, 376, in relation to amending an information, "An information stands upon different grounds from an indictment and is amendable." Citing Bishop's Criminal Procedure, Vol. I, section 611, and cases cited; *State v. Weare*, 38 N. Y., 319, and cases cited. But this case of *State v. Weare* cannot be found where referred to, nor in the Digest, and must be a mistake in the citation.

INNOCENCE PRESUMED.

In criminal cases, the rule is, that the person charged, is presumed to be innocent until his guilt is proved. *Tweedy v. State*, 5 Iowa, 334.

SANITY OF A DEFENDANT BEFORE TRIAL OR AFTER CONVICTION.

SECTION 4620. When a defendant appears for arraignment, judgment, or on any other occasion when he is required, a reasonable doubt arise as to his sanity, the court must order a jury to be empaneled from the trial jurors in attendance at the term, or who may be summoned by the direction of the court, as provided in this Code, to enquire into the

SEC. 4621. The arraignment, trial, judgment, or other proceedings, as the case may be, must be suspended until the question of insanity is determined by the verdict of the jury.

SEC. 4622. The trial for the question of insanity must proceed in the following order:

- . The counsel of the defendant must offer the evidence in support of the allegation of insanity;

- . The district attorney must then offer the evidence in support of the case on the part of the State;

- . The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

- . When the evidence is concluded, unless the case is submitted on either side, or both sides, without argument, the district attorney must commence, and the defendant's counsel conclude the argument to the jury;

- . If more than one counsel on each side argue the case to the jury, they must do so alternately;

- . The court shall then, on motion of either party, charge the jury. The provisions of this Code, so far as the same are applicable, and not herein changed, shall regulate the trial of the question of insanity.

SEC. 4623. If the jury find that the defendant is sane, the proceedings on the indictment shall be resumed.

SEC. 4624. If the jury find the defendant insane, the proceedings on the indictment shall be suspended until he becomes sane, and the court, if it deem his discharge dangerous to the public peace or safety, may order that he be in the meantime committed by the sheriff to the Iowa Insane Hospital, and that upon his becoming sane, he be delivered by the superintendent of the hospital to the sheriff.

SEC. 4625. The commitment of the defendant, as provided in the last section, exonerates his bail, or entitles a person authorized to receive the property of the defendant, to a return of the money he may have deposited instead of bail.

SEC. 4626. If the defendant be received into the hospital,

he must be detained there until he becomes sane. When he becomes sane, the superintendent of the hospital must give notice of that fact to the sheriff and to the district attorney of the proper district. The sheriff must thereupon, without delay, bring the defendant from the hospital, and place him in the proper custody until he be brought to trial or judgment as the case may be, or be legally discharged.

SEC. 4627. The expense of sending the defendant to the hospital, bringing him back, and any other expense incurred, are to be paid in the first instance by the county from which he was sent, but the county may recover from the estate of the defendant, if he have any, or from a relative, or another county, town, township, or city, bound to provide for or maintain him elsewhere.

SEC. 4628. Sheriffs for delivering persons found to be insane, under the provisions of this chapter, are entitled to the same fees therefor, as are allowed for conveying convicts to the penitentiary.

INSANITY—ARRAIGNMENT OF DEFENDANT FOR TRIAL.

An inquiry as to the mental condition of the prisoner, under section 5015, Revision of 1860, which is substantially like section 4620, Code of 1873, should be limited to the time when he appears for arraignment, or to the occasion which renders such inquiry proper, and should not relate to the time at which the offense of which he is accused was committed. *State v. Arnold*, 12 Iowa, 480.

As to insanity in general, see "Defenses."

QUESTION TO BE ADJUDICATED.

The question to be submitted upon an examination of this character is, as to whether the prisoner is of sufficient intellect to comprehend the course of proceedings at the trial, so as to make a proper defense. 7 Carr. & P., 303.

MISDEMEANORS.

This examination applies to misdemeanors as well as felonies. *Rea v. Little*, Russ. & Ry., 430; and, also, to all offenses. 1 Russ. on Crimes, 7th ed., marginal page 16; 39 and 40 G., 3, chapter 94, section 2; 1 Arch. Cr. Pr. & Pl., 6th ed., 5.

BURDEN OF PROOF AND ISSUE.

When a jury is empaneled to try the sanity of a prisoner under this law, the prosecution first introduces its evidence

to prove the sanity of the prisoner, and has the opening and closing. *Rex v. Davis*, 3 Carrington & Kerwan, 328.

FINDING OF JURY WITHOUT EVIDENCE.

The jury, upon an issue of this character, may adjudge the state of mind of the prisoner from his demeanor during the examination, and may find him to be insane without any evidence being introduced, and that it is not necessary to ask him whether he desired to cross-examine witnesses or make any remarks. 1 Russ., on Crimes, 7th ed., marginal page 16; *Regina v. Goode*, 7 Adolphus & Ellis, Q. B., 536.

INSTRUCTIONS.

For instructions to the jury in a question of the insanity of the prisoner, see *People v. Lake*, 2 Park Cr. R., 215, in which the charge of the court to the jury is set out in full.

COURTS—JURISDICTION.

The common law applies to inferior as well as superior courts, and under our laws, in Sec. 4620, Code of 1873, the foregoing provision would apply to justices and other inferior courts as well as to District Courts. For there is no good reason why a prisoner should be tried in any court for a public offense when there is cause for believing that he is incapable of making a proper defense, as the common and statute law both forbid the trial, sentencing, or punishment of an insane person for a crime while he continues in that state. *People v. Freeman*, 4 Denio, 9; Hale P. C., 34 & 35; 4 Bl. Com., 395; 1 Chitty Cr. L. (ed. 1841), 761.

PARTIAL INSANITY.

But one capable of rightly comprehending his own condition in reference to the proceeding against him, and of conducting his defense in a rational manner, is not insane, within the meaning of the rule, though on some other subjects his mind may be deranged. *Freeman v. People*, 4 Denio, 9.

IMPANELING JURY—CAUSE FOR CHALLENGE.

It is good cause of challenge that the juryman has formed and expressed an opinion that the prisoner was guilty of the act charged. 4 Denio, 9.

PEREMPTORY CHALLENGES.

On such a preliminary trial the defendant is not entitled to peremptory challenges, but for cause only. 4 Denio., 9; 2 Hall P. C., 267, C. 35; Foster's Cr. L., 42.

BILL OF EXCEPTIONS DOES NOT LIE.

A bill of exceptions does not lie to review questions determined on the trial of such collateral issue. *Ib.*

OATH, FORM OF.

The oath to the jury may be given in the following form: You do solemnly swear, that you will diligently inquire into, and true presentment make, on relation of the *State of Iowa v. W. F. Stone*, whether the said defendant be insane or not; and a true verdict give according to the laws given to you by the court, and to the best of your ability.

INTENT.

The rule of law has long been settled, that a person who does an act willfully, necessarily intends that which must be the consequences of his act. *Rex v. Harrington*, Russ & R., 207; *Rex v. Dixon*, 3 M. & S., 15; *Com. v. Drew*, 4 Mass., 391; *State v. Gillick*, 7 Iowa, 311. If the intent in a case must have distinct and substantive proof, it would almost always be impossible to convict where the defendant, in a burglary did not succeed in going beyond the mere breaking and entering, for no one could tell what his ultimate intentions were. The intent may be inferred from facts. *State v. Maxwell*, 42 Iowa, 211.

INTENT GIST OF THE OFFENSE.

Where the intent is the gist of the offense it must be proved as laid in the indictment, and this from acts of defendant. *State v. White*, 41 Iowa, 316; see, also, note on page 274, 2 Green Cr. R.

JUDGMENT.

SECTION 4495. Upon a verdict of not guilty for the defendant, or special verdict upon which a judgment of acquittal must be given, the court must render judgment of acquittal immediately.

SEC. 4496. Upon a plea of guilty, upon a verdict of guilty, or a special verdict, upon which a judgment of conviction must be rendered, the court must fix a time for pronouncing judgment. The time appointed for pronouncing judgment must be at least three days after the verdict is rendered, if the court remain in session so long, or if not, as remote a time as can reasonably be allowed, but in no case can the judgment be pronounced in less than six hours after the verdict is rendered.

SEC. 4497. For the purpose of judgment, if the conviction be for a felony, the defendant must be personally present; if it be for misdemeanor, judgment may be pronounced in his absence.

SEC. 4498. If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or money deposited, may make an order directing the clerk to issue a bench warrant for his arrest.

SEC. 4499. The clerk, on the application of the district attorney, may, accordingly, at any time after the order, whether the court be in session or not, issue a bench warrant into one or more counties for his arrest.

SEC. 4500. The bench warrant may be substantially in the following form:

COUNTY OF.....

THE STATE OF IOWA,

To any Peace Officer in the State:

A. B. having been duly convicted on the....day of....., A. D. 18.., in the district court of.....county, of the crime of (here designate it generally, as in the indictment).

You are, therefore, hereby commanded to arrest the said A. B. and bring him before said court for judgment, if it be then in session, or if it be not then in session, you deliver him into the custody of the sheriff of said county.

Given under my hand and the seal of said court, at [SEAL.] any office in———, in said county, this——day of ———, A. D. 18—.

By order of the court. ————, Clerk.

SEC. 4501. The bench warrant may be served in any county in the State.

SEC. 4502. Whether the bench warrant be served in the county where it was issued, or in another county, the officer must arrest the defendant and bring him before the court, or commit him to the officer mentioned in the warrant according to the command thereof.

SEC. 4503. When the defendant appears for judgment, he

shall be informed by the court, or by the clerk under its direction, of the nature of the indictment, and of his plea, and the verdict, if any thereon, and must be asked whether he have any legal cause to show why judgment should not be pronounced against him.

SEC. 4504. He may show for cause against the judgment, that he is insane, or any sufficient ground for a new trial, or in arrest of judgment.

SEC. 4505. If the court is of opinion that there is reasonable ground for believing him insane, the question of his insanity shall be determined as provided in this Code, and if he is found to be insane, such proceedings shall be had as are herein directed.

SEC. 4506. If he move for a new trial, or in arrest of judgment, the court shall defer the judgment, and proceed to hear and decide the motions.

SEC. 4507. If no sufficient cause be alleged or appear to the court why judgment should not be pronounced, it shall thereupon be rendered.

SEC. 4508. If the defendant is convicted of two or more offenses, before judgment on either, the punishment of each of which is, or may be, imprisonment, the judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any other of the offenses.

SEC. 4509. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine.

SEC. 4510. When a person is, in any event, to be committed to jail, if there be no jail or no sufficient one in the county where the party would be committed under the ordinary provisions of law, the court or magistrate committing may order him to be committed to the jail of some other county, which shall be one which is the most convenient and safe, and the county to which the cause originally belonged shall be holden for all the expenses thereof.

SEC. 4511. In all cases, except murder in the first degree, the court rendering judgment must make an order fixing the amount in which the bail must be taken, and there shall be no execution of the judgment until such order be made.

JUDGMENT—THREE DAYS.

Under section 4496, Code of 1873, it is proper, and the court must allow the defendant three entire days between the rendering of the verdict and the judgment, and this is not to

include the day that the judgment was rendered. This statute applies, however, only where the term continues long enough to allow this extension. *State v. Marvin*, 12 Iowa, 502; *State v. Watrous*, 13 Iowa, 495; *State v. Wood*, 17 Iowa, 19.

TIME CANNOT BE LESS THAN SIX HOURS.

In no case can the time for pronouncing judgment be less than six hours, after the verdict is rendered. *State v. Watrous*, 13 Iowa, 495.

PRESENCE OF DEFENDANT IN CASE OF FELONY.

Sentence of corporeal punishment cannot be given in the absence of the defendant. *People v. Winchell*, 7 Cow., 525; *Son v. People*, 12 Wend., 348.

OF MISDEMEANORS.

Under section 3059, Code of 1851, which is the same as section 4497, Code of 1873, where the defendant has been convicted of a misdemeanor, he is not required to be present at the time of sentence. *State v. Hughes*, 4 Iowa, 556.

RECORD SHOULD SHOW THAT DEFENDANT APPEARED BEFORE SENTENCE.

There is no statute requiring the record to show that, previous to sentence, the prisoner was asked whether he had anything to say why sentence should not be passed, or to show cause why the same should not be done; yet it is a better practice to make such a matter of record, as such question, under section 4503, Code of 1873, must be propounded to the prisoner. *State v. Wood*, 17 Iowa, 22; *State v. Crim*, 43 Ala., 53; *State v. Mullen*, 45 Ala., 43; 6 Am. R., 691.

MISDEMEANOR.

In cases of misdemeanors it is not necessary to ask the prisoner whether he has any cause to show why judgment should not be rendered against him. *State v. Stiefel*, 13 Iowa, 603.

DISTINCT AND SEPARATE SENTENCES ON DIFFERENT COUNTS.

Where a defendant is convicted on various counts in an indictment prescribing different punishments, "the court can

impose a distinct sentence on each count." *Com. v. Birdsall*, 69 Penn. St., 482; 8 Am. R., 283.

TERM OF IMPRISONMENT.

The sentence of imprisonment for crime should be apportioned to the circumstances of the offense. A sentence of ten years for incest with a step-daughter, may be reduced to five years. *State v. Thompson*, 45 Iowa, 414.

SENTENCE—MODIFICATION BY TRIAL COURT.

The court after having rendered a judgment in a criminal case, cannot vacate it or render a new judgment after the term at which it was pronounced is ended, or the judgment is executed, and the punishment is partly borne. *State v. Gray*, 37 N. J., 368; 1 Am. Crim. R., Hawley, 554.

GENERAL POWERS OF COURT OVER ITS JUDGMENTS.

The general power of the court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of which the term at which they are first made, is undeniable. *Bassett v. United States*, 9 Wall., 38; 2 Green's Cr. R., 103; *Ex parte Lange*, 18 Wall., 163.

SENTENCE PARTIALLY COMPLIED WITH.

Where a judgment of a court is rendered and carried into execution before the expiration of the term, the judge cannot vacate that sentence and substitute fine or imprisonment, and cause the latter sentence also to be executed; nor has a court the power to change the sentence to a different punishment after the prisoner has commenced to serve out a sentence, though such court is still in session. *Ex parte Lange*, 18 Wall., 163; 2 Gr. R., 107.

JUDGMENT—ENTERING ON SUNDAY.

While it is well settled that a court may receive a verdict of a jury on Sunday, it is equally well settled that no valid judgment can be entered on Sunday on a verdict, and this in England, as well as most of the states of the Union. *Baxter v. People*, 3 Ill. (Gilm.), 384, 386; *Swan v. Brown*, 3 Burr., 1595; 3 Thomas Coke, 354; 2 Bl. Com., 277; *Mackelday's Case*, 5 Coke, 66; *Pearce v. Atwood*, 13 Mass., 324; *Chapman v. State*, 5 Blackf., 111; *Nabors v. State*, 6 Ala., 200; 4 N. H.,

158; *Authur v. Mosby*, 2 Bibb., 589; *Story v. Elliott*, 8 Cow., 27; 1 Wend., 57; *Coleman v. Henderson* (Ky.), Sel. Cas., 171; *Vanderwerker v. People*, 5 Wend., 530; *Harper v. State*, 43 Texas, 431; *Shearman v. State*, 1 Texas Court of Appeals R., 215.

JUDGMENTS FOR FINES, WHEN LIENS; HOW EXECUTIONS THEREON STAYED.

SECTION 4609. Judgments for fines, in all criminal actions rendered, are, and may be made, liens upon the real estate of the defendant, in the same manner, and with like effect, as judgments in civil actions.

SEC. 4610. The defendant may have a stay of execution for the same length of time, and in the same manner, as provided by law in civil actions, and with like effect, and the same proceedings may be had therein.

LIBERATION OF POOR CONVICTS.

SECTION 4611. When any person convicted of a criminal offense is sentenced to pay a fine and costs only, and stand committed until sentence be performed, if the sentence be not complied with by payment of the sum due within thirty days next following, the sheriff may liberate him from prison if committed for no other cause, and if he be unable to pay such fine and costs, upon his giving his promissory note for the amount due, payable to the treasurer of the county where he was committed, on demand with interest, accompanied with a written schedule containing a true account of all his property, of every kind, by him signed and sworn to; which note and schedule must be by such sheriff delivered without delay to the treasurer for the use of the county.

SEC. 4612. If such convict knowingly and willfully make any false schedule, on oath, relating to the amount or nature of his property, he is guilty of perjury.

SEC. 4741. For every day's labor performed by any convict under the provisions hereof, there shall be credited on any judgment for fine and costs against him, the sum of one dollar and fifty cents, and no person shall be entitled to the benefits of the law providing for the liberation of poor convicts, if in the opinion of the sheriff, the judgment may be satisfied by the labor of the person as herein authorized.

The note to be given and the application to be discharged

from custody, under the provisions of the forgoing sections, may be in the following form, viz:

STATE OF IOWA, }
vs. }
A . . . B . . . }

To the Sheriff of Linn County, Iowa:

The undersigned, now confined in the county jail of Linn county, Iowa, on an order and sentence of the District Court of said Linn county, on a charge of larceny, asks to be released from custody under the provisions of sections 4611 and 4612, for the liberation of poor convicts; and in support of this request files the following note and schedule of his property.

A . . . B . . .

\$200.00

MARION, LINN CO., IOWA, June 2d, 187 . .

On demand I promise to pay to the treasurer of Linn county, Iowa, the sum of two hundred dollars, with six per cent interest from date.

A . . . B . . .

STATE OF IOWA, } ss.
LINN COUNTY, }

I, A B, being duly sworn, upon oath do say, that I was convicted, in the District Court of Linn county, Iowa, at the May term thereof, 1876, on a charge of larceny, and sentenced to pay a fine of one hundred and fifty dollars, and costs taxed at fifty dollars, total amount two hundred dollars, and in default of payment I was imprisoned in the county jail until such fine and costs are paid, and that I am not committed for any other cause; and that I have been confined in said jail on such sentence for thirty days. And I further aver that the following is a correct and true schedule of all the property that I now have, and that the same is exempt from execution, to-wit: One span of horses of the value of one hundred dollars, one common lumber wagon of the value of sixty dollars, one white cow of the value of twenty dollars, and four hogs of the value of forty dollars.

A . . . B . . .

Subscribed and sworn to before me this . . . day of . . . 187 . .

C . . . D . . . , *Notary Public.*

Before a prisoner can take the benefit of the provisions of this statute he must have been imprisoned thirty days; so that this statute would not apply to a prisoner sentenced for the nonpayment of his fine, by a justice of the peace or other inferior court, as these courts are limited to fines not exceeding one hundred dollars; and, being imprisoned for thirty days, would entitle the prisoner to the right of a discharge, he being entitled to the sum of three dollars and thirty-three and one-third cents per day during the time of his imprisonment, so that it can only apply to a sentence of fine for over one hundred dollars, and that of a District or a superior court.

DEFENDANT ENTITLED TO HAVE A JUDGMENT AGAINST HIM CANCELED.

When a defendant, sentenced to imprisonment, in default of the payment of a fine entered against him in a criminal case, substantially complies with section 4611 of the Code, by suffering imprisonment for the time provided, and executes his note to the treasurer for the requisite amount, he is not only

entitled to be discharged from custody, but to have the judgment entered against him satisfied. *State v. Van Vleet*, 23 Iowa, 168; *State v. Peck*, 37 Ib., 342; *State v. Jordan*, 39 Ib., 390, 396; *County v. Hierb*, 37 Ib., 351.

THIRTY DAYS IMPRISONMENT ESSENTIAL TO A RELEASE.

There must have been an imprisonment of thirty days in order to entitle a defendant to the benefits of section 4611. *State v. Peck*, 37 Iowa, 342.

JUDGMENT—SATISFACTION—FULL TERM OF IMPRISONMENT DOES NOT SATISFY THE JUDGMENT.

The fact that a defendant served out his full term of imprisonment does not entitle him to have the judgment satisfied under section 4881, Rev. 1860, or 4509, Code of 1873; but the judgment would still stand in force, as against the defendant, unless he complies with Sec. 4611, Code of 1873, by giving his note, and filing a schedule of his property. *State v. Peck*, 37 Iowa, 344.

POWER OF SHERIFF TO LIBERATE PRISONER.

The question as to that part of section 4741, conferring authority on a sheriff to decide as to whether, in his opinion, a prisoner shall be entitled to liberation from his custody is legal or not, "*quere.*" *State v. Jordan*, 39 Iowa, 397.

It is generally conceded that such authority cannot be conferred on a sheriff, and that that portion of section 4741 is unconstitutional and void.

LIMITATION OF CRIMINAL ACTIONS.

SECTION 4165. A prosecution for murder may be commenced at any time after the death of the person killed.

Sec. 4166. An indictment for a public offense must be found within eighteen months after the commission thereof, in the following cases, and not after:

1. Taking or enticing away an unmarried female, under the age of fifteen years, for the purpose of marriage or prostitution;

2. Seducing or debauching an unmarried female, of previously chaste character;

3. For rape and adultery;

4. For an assault with intent to commit a rape.

Sec. 4167. In all other cases an indictment for a public

offense must be found within three years after the commission thereof, and not afterwards.

SEC. 4168. A prosecution for a misdemeanor, triable before a justice of the peace, must be commenced within one year after the commission thereof, and not after.

SEC. 4169. If, when the offense is committed, the defendant is out of the State, the indictment or prosecution may be found or commenced within the time herein limited after his coming into the State, and no period during which the party charged was not usually and publicly resident within the State is a part of the limitation.

SEC. 4170. An indictment is found within the meaning of this chapter, when it is duly presented by the grand jury in open court and there received and filed.

LIMITATION, PLEA OF.

The question whether an offense was barred by the statute of limitation, cannot properly be raised by demurrer, by instructions or motion for a new trial, but should be specially pleaded; and when so pleaded, the State has a right to reply. *State v. Hussey*, 7 Iowa, 409; *State v. Groome*, 10 Iowa, 311; *U. S. v. White*, 5 Cranch C. C., 60; *State v. Howard*, 15 Rich. (S. C.), 282; *U. S. v. Cook*, 12 Am. Law Register (N. S.), 682. The point cannot be raised for the first time by motion in arrest of judgment, for it might have appeared from the evidence that the defendant was brought within some of the exceptions, such as being out of the State, etc. *State v. Hobbs*, 39 Maine, 212; *People v. Santvoord*, 9 Cow., 660; *State v. Rust*, 8 Blackf., 195.

CONTRARY DOCTRINE HELD.

It is held that the prosecutor must so frame the indictment as to bring the offense within the period specified in the statute of limitations, or the defendant may demur, move in arrest of judgment, or bring error. *State v. Bryan*, 19 La. Ann., 435; *U. S. v. Watkins*, 3 Cranch C. C., 550; *People v. Miller*, 12 Cal., 294; *State v. McLane*, 4 Geo., 340.

PLEA NOT NECESSARY, BUT IS A MATTER OF EVIDENCE.

It is not necessary to plead the statute of limitation in criminal cases, but the defendant may give it in evidence under the general issue, which then affords the prosecutor an opportunity, where the statutes contain an exception, to intro-

ce rebutting evidence, and bring the defendant within one of the exceptions. *Com. v. Ruffner*, 28 Penn. St., 260; *State Harwood*, 18 Indiana, 492.

INDICTMENT—ALLEGATION OF—EXCEPTIONS.

The indictment need not set out that the defendant was out of the State, and for that reason the case is still within the State. See "Indictment," "Limitation," "Exception."

LOCAL AND GENERAL JURISDICTION OF PUBLIC OFFENSES.

SECTION 4155. Every person, whether an inhabitant of this or any other state or country, or of a territory, or district of the United States, is liable to punishment by the laws of this State for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States.

SEC. 4156. The local jurisdiction of the district court is over offenses committed within the county in which it is held, and of such other cases as are, or may be, provided by law.

SEC. 4157. When the commission of a public offense commenced without this state is consummated within the boundaries thereof, the defendant is liable to punishment therefor in this state though he was without the state at the time of the commission of the offense charged; *provided*, he consummated the offense through the intervention of an innocent or guilty agent within this state, or any other means proceeding directly from himself; and in such case the jurisdiction is in the county in which the offense is consummated.

SEC. 4159. When a public offense is committed in part in one county and part within another, or when the acts or effects constituting, or requisite to the consummation of the offense, occur in two or more counties, jurisdiction is in either county.

SEC. 4160. When a public offense is committed on the boundary of two or more counties, or within five hundred rods thereof, the jurisdiction is in either county.

SEC. 4161. When an offense is committed within the jurisdiction of this state on board a boat, raft, or vessel navigating a river, lake, or canal, or lying therein in the prosecution of her voyage, the jurisdiction is in any county through which the boat, raft, or vessel is navigated in the course of her voyage, or in the county where the voyage shall terminate.

SEC. 4162. The jurisdiction of an indictment for the crime of kidnapping, or without lawful authority seizing and confining another, or kidnapping him with intent, against his will, to

cause him to be confined or imprisoned within the state, or to be sent out of the state; or of taking or enticing away a child under the age of twelve years from the parents, guardian, or other person having the legal charge of the person, with the intent to detain or conceal said child; or of taking or enticing away an unmarried female of previous chaste character under the age of fifteen years, for the purpose of prostitution; or of taking any woman unlawfully and against her will, or by force, menace, or duress, compelling her to marry against her will; or of seducing and debauching any unmarried woman of previously chaste character, is in any county in which the offense is committed, or into which or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the offender in instigating, procuring, promoting, aiding in, or being an accessory to the commission of the offense, or in abetting the parties concerned therein.

SEC. 4163. When the offense of bigamy is committed in one county, and the defendant is apprehended in another, the jurisdiction is in either county.

SEC. 4164. When the offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to prosecution or indictment thereof in another.

JUDGES CANNOT DELEGATE THEIR OFFICIAL AUTHORITY TO ONE NOT A JUDGE.

A judge cannot delegate his authority to another, nor adopt the acts of an attorney upon the bench, as the judicial acts of the court. *Wright v. Boon*, 2 G. Greene, 458; *Michales v. Hine*, 3 Ib., 470; *Winchester v. Ayers*, 4 Ib., 104; *Petty v. Durall*, Ib., 120; *State v. Brandt*, 41 Iowa, 603. At least such substitution cannot be made against the objection of either party. *Smith v. Frisbie*, 7 Iowa, 486.

EXCHANGES BY JUDGES, HOLDING EACH OTHER'S COURTS.

The judges can legally interchange, and hold each other's courts, and such is not inconsistent with the constitution, under Sec. 1575, Code of 1851, which is the same as Sec. 175, Code of 1873. *State v. Stingley and McCormick*, 10 Iowa, 488.

ABORTION.

Section 4159, Code of 1873, does not apply to prosecutions for abortions. See title, "Abortion." *State v. Hollenbeck*, 36 Iowa, 112.

LARCENY — PROPERTY STOLEN IN ANOTHER STATE AND BROUGHT INTO THIS STATE.

See title, "Larceny," "Jurisdiction."

JURISDICTION — CONVICTIONS ON INDICTMENTS FOR OFFENSES WITHIN THE JURISDICTION OF INFERIOR COURTS.

The jurisdiction of the District Court is to be determined by the value alleged in the indictment, and not by the value ascertained by the verdict of the jury. *State v. Church*, 8 Iowa, 259.

DEGREE OF OFFENSES.

A defendant, although charged with a crime, within the original jurisdiction of the District Court, may, nevertheless, be convicted of a minor offense in that court, though such minor offense is within the jurisdiction of an inferior court. *State v. Benham*, 1 Iowa, 542; *State v. Gibson*, 3 Ib., 410; *State v. Dixon*, 3 Ib., 416; *State v. Shepard*, 10 Ib., 126; *State v. Tweedy*, 11 Ib., 350. And sections 4465 and 4466, Code of 1873, which is the same as sections 4835 and 4836, Rev. of 1860, are not in conflict with section 11, article I, of our constitution. *State v. Shepard*, 10 Iowa, 126; *State v. Jarvis*, 21 Ib., 45.

COUNTIES BORDERING ON THE MISSISSIPPI RIVER.

The District Courts of the State, in counties bordering on the Mississippi river, have jurisdiction of offenses committed anywhere on the waters thereof; although such offenses are committed beyond the *medium filum aqua* and near to the lands of a coterminous State. *State v. Mullan*, 35 Iowa, 199; *Mahler v. Transportation Co.*, 35 N. Y., 352; *State v. Nash*, 2 G. Greene, 295.

ABSENCE FROM STATE TO AVOID ARREST.

The absence from the State or from his usual place of abode, by the defendant, for the purpose of avoiding arrest or prosecution, amounts to a fleeing from justice; and the period of such absence is to be deducted from the time limited by statute.

QUASHING OF INDICTMENT—EFFECT OF.

When any indictment or prosecution shall be quashed, set aside or reversed, the time during which the same was pend-

ing shall not be computed as part of the limitation prescribed for the offense.

STATUTE OF LIMITATION—SPECIAL PLEA.

The question as to the statute of limitation cannot be raised by demurrer, but should be by plea. *State v. Hussey*, 7 Iowa, 409. Nor instructions or motion for a new trial. *State v. Groome*, 10 Iowa, 309; *U. S. v. White*, 5 Cranch, C. C., 60; *State v. Howard*, 15 Rich. (S. C.), 282; *U. S. v. Cook*, 12 Am. Law Register, 682.

ABSENCE FROM STATE.

If, after the offense is committed, there is any period during which the party charged, was not usually and probably a resident within the State, such period is not to be taken as a part of the limitation. *State v. Hussey*, 7 Iowa, 410.

CONCURRENT JURISDICTION.

The concurrent jurisdiction of the States of Illinois and Iowa, over the Mississippi, attaches to cases, either civil or criminal, arising out of the commerce of such river. *Gilbert v. The Moline Water Power and Manufacturing Co.*, 19 Iowa, 319.

RETRIAL—DEGREE OF OFFENSE ON SECOND TRIAL.

Where a defendant is acquitted of the higher degree, and convicted for a lesser offense, on a retrial he cannot be again put on his trial for the higher degree, of which he was acquitted. *State v. Tweedy*, 11 Iowa, 350; *State v. Ball*, 27 Mo., 324. So where the defendant was put upon his trial for murder in the first degree, for which the indictment was insufficient, *held* that his conviction for murder in the second degree, for which the indictment was good, was unauthorized. *State v. Boyle*, 28 Iowa, 522. It was held in 11th Iowa, where the defendant was acquitted of murder and convicted of manslaughter, that he could not again be put upon trial for murder. *State v. Martin*, 30 Wis., 216; 11 Am. R., 567; *State v. Ross*, 29 Mo., 32, 42.

COMMISSION OF AN OFFENSE ON BOARD OF BOATS, RAFTS OR VESSELS.

Where the crime is committed on a raft or vessel, a defend-

ant may be indicted for the same, in any county, through any part of which such vessel or raft may have passed on that trip or voyage. *State v. Nash*, 2 G. Greene, 286.

MALICE.

Malice is presumed from the acts done until the contrary is proven and that devolves on the defendant. *State v. Gillick*, 7 Iowa, 290; *State v. Decklots*, 19 Ib., 448.

Malice means hatred, ill-will or hostility to another, yet in its legal sense it has a very different meaning, perhaps well expressed by the words, "a wrong motive of any kind;" it signifies the willful doing of an injurious act without lawful excuse. *State v. Pike*, 40 N. H., 399; 6 Am. R., 533.

MAYORS—JURISDICTION.

SECTION 518. The mayor shall be elected biennially in cities of the first class, and annually in cities of the second class, by the qualified voters of the city. He shall be a qualified elector and reside within the limits of the city, and shall hold his office for the term for which he shall have been elected and qualified. He shall keep an office at some convenient place in the city, to be provided by the city council, and shall keep the corporate seal of the city in his charge; he shall sign all commissions, licenses, and permits granted by authority of the city council, and such other acts as by the law or ordinances may require his certificate.

SEC. 519. In case of the mayor's death, disability, resignation, or other vacation of his office, the city council shall order a special election, as soon as practicable, to fill the vacancy for the remainder of the time of office, and may appoint some qualified elector to act as mayor until such special election. The mayor of the city shall be its chief executive officer and conservator of the peace, and it shall be his special duty to cause the ordinances and the regulations of the city to be faithfully and constantly obeyed; he shall supervise the conduct of all the officers of the city, examine the grounds of all reasonable complaints made against any of them, and cause all the violations of their duty, or their neglect, to be promptly corrected or reported to the proper tribunal for punishment and correction; he shall have and exercise within the city limits the powers conferred upon the sheriffs of counties to suppress disorders and keep the peace; he shall also perform such other duties compatible with the nature of his office, as

the council may from time to time require; he shall receive such salary, payable quarterly out of the city treasury, as may be provided by ordinance; but the amount of such salary shall neither be increased nor diminished during an incumbent's term of office.

SEC. 482. Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this chapter, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days.

SEC. 484. Whenever a fine and costs imposed for the violation of any ordinance are not paid, the person convicted may, by the officer having jurisdiction of the case, be committed until the fine and costs are paid, not to exceed thirty days.

SEC. 485. Any city or town shall have the right to use the jail of the county for the confinement of such persons as may be liable to imprisonment under the ordinances of such city or town, but it shall be liable to the county for the cost of keeping such prisoners.

SEC. 506. The mayor of each city or incorporated town shall be a magistrate and conservator of the peace, and, within the same, have the jurisdiction of a justice of the peace in all matters, civil and criminal, arising under the laws of the state or the ordinances of such city or town; and the rules of law regulating proceedings before a justice of the peace shall be applicable to proceedings before such mayor; but the criminal jurisdiction hereby conferred shall be co-extensive with the county in which such city or town is situated.

SEC. 531. The mayor of cities of the second class shall be the presiding officer of the city council, and shall constitute a member of such council, and shall have a casting vote where there is a tie.

SEC. 4108. Any judge of the supreme, district, or circuit courts, any judge of any city court, any justice of the peace, any mayor of any incorporated city or town, any police, or other special justice of such city, or town, shall have power to hear complaints and preliminary informations, to issue warrants, order arrests, require security to keep the peace, make commitments, and take bail in the manner directed by this code. They are designated under the general term magistrate, and may exercise the jurisdiction hereby conferred on them as follows:

1. Judges of the supreme, district, and circuit courts throughout the state, in any county in which they may be at the time of complaint made;

2. Judges of city courts, justices of the peace, mayors of incorporated cities and towns, and police and other special justices of such cities and towns, within their respective counties.

SEC. 4109. The following persons respectively are designated in this code under the general term, peace officer:

1. Sheriffs and their deputies;

2. Constables;

3. Marshals and policemen of incorporated cities and towns.

SEC. 4110. Magistrates and peace officers are sometimes designated by the term, officers of justice.

SEC. 4111. Complaint of preliminary information is a statement in writing, under oath or affirmation made before a magistrate, of the commission, or threatened commission of a public offense, and accusing some one thereof.

Every municipal corporation is provided with an executive head, usually styled the mayor. The mayor is the head officer or executive magistrate of the corporation, but with us it is important to bear in mind that all his powers and duties depend entirely upon the provisions of the charter or constituent act of the corporation, and valid by-laws passed in pursuance thereof and these vary, of course, in different municipalities. Properly and primarily his duties are executive and administrative, and not judicial or legislative. But judicial duties are often superadded to those which properly appertain to the office of mayor, and he is invested with the authority to administer not only the ordinances of the corporation, but also, judicially, to administer the laws of the State. Dillon on Municipal Corporations, 1 Vol., Sec. 147, 2d ed. From the provisions above set out (Code of 1873) the jurisdiction of the mayor of towns and cities is: 1st. For violations of ordinances. 2d. Of all civil actions arising within the corporate limits. 3d. Of all criminal cases for violation of the State law, his jurisdiction is co-extensive within the county with that of a justice of the peace; and, 4th. Of all matters of a criminal nature on a preliminary examination, the same as a justice. Where a case is taken by a change of venue from the justice, the cause goes to the next nearest justice against

whom no objections exist, such as are named in the Code, and if a mayor is nearer than the other or second justice in the township, then the cause goes to the mayor, if he is not disqualified to act for some of the causes set out in the Code, under the provision for a change of venue; and this applies to preliminary examinations as well as trial causes. Under the Rev. of 1860, a justice of the peace had no jurisdiction to hear, try and determine a criminal case for the violation of an ordinance, unless especially provided for by the City Council. *Goodrich v. Brown*, 30 Iowa, 291; and for the reason that the mayor under the Rev. of 1860 had (exclusive) jurisdiction, (this word exclusive was left out of the Code of 1873), now under the Code a justice may issue his warrant and detain for trial, and try, any person violating an ordinance. *Jaquith v. Royce*, 42 Iowa, 406. The power of the mayor includes the power to imprison. *City of Davenport v. Bird*, 34 Iowa, 529; *Huddlesson v. Ruffin*, 6 Ohio, St.. 604.

CHANGE OF VENUE.

Under section 506, the mayor of each city or incorporated town shall be a magistrate and conservator of the peace, and, within the same, have the jurisdiction of a justice of the peace in all matters, civil and criminal, arising under the laws of the State or the ordinances of such city or town; and the rules of law regulating proceedings before a justice of the peace shall be applicable to proceedings before such mayor; but the criminal jurisdiction hereby conferred shall be co-extensive with the county in which such city or town is situated.

The court held that under a violation of an ordinance, where the defendant was arrested and before trial demanded a change of venue, the same should have been granted; and, when taken it goes to the next nearest justice, not included in the affidavit for a change. *Finch v. Marvin*, 46 Iowa, 384.

JURY TRIAL.

It is said by Dillon in his work on Municipal Corporations, Vol. 1, Sec. 361, 2d ed.: "Proceedings for the violation of municipal ordinances are frequently summary in their character, and it has been made a question how far statutes or charters authorizing such proceedings are valid, especially

where *no* provision is made for trial by jury. This must depend upon the constitution of the State and the extent to which the power of the Legislature is therein restricted. By the constitution of Iowa it is provided:

"SECTION 9. The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law."—Sec. 9, Article I, Bill of Rights.

And by section 4681 (see title "Proceedings and Trials Before Justices") it is provided that six shall constitute a jury. Then, by Sec. 506, above cited, "and the rules of law regulating proceedings before a justice of the peace shall be applicable to proceedings before such mayor." These provisions settle this question, and that the right of trial by jury exists before a mayor's court, whether on trial for a violation of an ordinance or State law. This theory is supported in *Manchester v. Hoag*, 46 Iowa, 337.

APPEAL FROM MAYOR'S COURT.

An appeal will lie to the District Court from the judgment of the mayor of a town, incorporated under the general law, for the violation of an ordinance. *Town of Manchester v. Hoag*, 46 Iowa, 337.

MAGISTRATES AND THEIR POWERS.

SECTION 4108. Any judge of the supreme, district, or circuit court, any judge of any city court, any justice of the peace, any mayor of any incorporated city or town, any police, or other special justice of such city, or town, shall have power to hear complaints and preliminary informations, to issue warrants, order arrests, require security to keep the peace, make commitments, and take bail in the manner directed by this code. They are designated under the general term magistrate, and may exercise the jurisdiction hereby conferred on them as follows:

1. Judges of the supreme, district, and circuit courts throughout the state, in any county in which they may be at the time of complaint made;

2. Judges of city courts, justices of the peace, mayors of incorporated cities and towns, and police and other special justices of such cities and towns, within their respective counties.

SEC. 4109. The following persons respectively are designated in this code under the general term, peace officer:

1. Sheriffs and their deputies;
2. Constables;
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SEC. 4110. Magistrates and peace officers are sometimes designated by the term, officers of justice.

SEC. 4111. Complaint of preliminary information is a statement in writing, under oath or affirmation made before a magistrate, of the commission, or threatened commission, of a public offense, and accusing some one thereof.

Peace officers, under Sec. 4109, Code of 1873, are sheriffs, and their deputies, constables, marshals, and policemen of incorporated cities and towns. *Blair & Bronson v. Dubuque County*, 27 Iowa, 181.

MODE OF TRIAL.

SECTION 4347. Issues of law shall be tried by the court. Issues of fact shall be tried by a jury.

SEC. 4348. An issue of law arises upon a demurrer to the indictment. No joinder in demurrer is necessary.

SEC. 4349. An issue of fact arises on a plea of not guilty, or of former conviction or acquittal of the same offense. No replication or further pleading is necessary.

SEC. 4350. An issue of fact must be tried by a jury of the county in which the indictment is found, unless a change of venue has been awarded.

SEC. 4351. If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel; but if for a felony, he must be personally present.

A DEFENDANT ENTITLED TO A SPEEDY AND PUBLIC TRIAL.

The constitution of Iowa, as well as of many other States, give a defendant, in all criminal prosecutions, the right to a speedy and public trial.

PERSONAL PRESENCE OF DEFENDANT DURING TRIAL.

If the defendant is charged with a felony, he must be personally present during the trial; but if indicted for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel. Sec. 4351, Code of 1873; *State v. Harman*, 2 G. Greene, 283.

DEFENDANT NEED NOT BE PRESENT DURING THE WHOLE TRIAL.

If it appears that the defendant was present at the commencement and conclusion of the trial, the appellate court will presume that the defendant was present all of the time, at least until the contrary is shown. *State v. Wood*, 17 Iowa, 19.

TIME OF ANSWER AND TRIAL BY DEFENDANT.

Under Secs. 4723, 4724, and 4725, Rev. of 1860, it was held that a defendant could not, without his consent, be put upon trial at the term at which the indictment was found, unless he had been previously held to answer on preliminary examination or was at the time in custody or under bail. *State v. Harris*, 33 Iowa, 356; *State v. Same*, 36 Ib., 268. But the provisions or sections above cited were not incorporated into the Code of 1873.

PLEADING AFTER RETURN OF A PROCEDENDO FROM SUPREME COURT.

It is held that the provisions of the above sections did not apply to cases tried in the Supreme Court, but could be tried as soon as the *procedendo* was returned. *State of Iowa v. Harris*, 36 Iowa, 268.

DEFENDANT'S RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM.

Under the constitution of Iowa, and most of the other States, a defendant cannot be tried without the right of being confronted with the witnesses against him. *State v. Reidel*, 26 Iowa, 431.

WAIVER OF DEFENDANT'S RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM.

In a criminal prosecution for a felony the defendant may waive the right, secured by the constitution, to be confronted with the witnesses against him, and consent that the testimony of the witnesses taken down in a former trial, based upon the same facts, may be read as evidence to the jury, as a substitute for the oral testimony and presence of the witnesses. *State v. Polson*, 29 Iowa, 133.

DEFENDANT'S RIGHT TO BE TRIED WITHOUT SHACKLES.

A prisoner is entitled to appear for trial, upon his own plea,

free from all manner of shackles or irons, unless there is danger of his escape. 2 Hale's P. C., 219; 4 Black. Com., 322; *Lavers' Case*, 6 State Trials (4th ed.), 230; 1 Leach's Cases, Crown Law, 36; *People v. Harrington*, 42 Cal., 165; 10 Am. R., 296.

TRIAL BY JURY.

See "Formation of Trial Jury."

NEW TRIAL.

SECTION 4487. A new trial is a re-examination of the issue in the same court before another jury, after a verdict has been given.

SEC. 4488. The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew and the former verdict cannot be used or referred to either in the evidence or in argument.

SEC. 4489. The court may grant a new trial for the following causes, or any of them:

1. When the trial has been had in the absence of the defendant, if the indictment be for a felony;

2. When the jury has received any evidence, paper, or document out of court not authorized by the court;

3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case;

4. When the verdict has been decided by lot, or by means other than a fair expression of opinion on the part of all the jurors;

5. When the court has misdirected the jury in a material matter of law;

6. When the verdict is contrary to law or evidence. But no more than two new trials shall be granted for this cause alone;

7. When the court has refused properly to instruct the jury;

8. When from any other cause the defendant has not received a fair and impartial trial.

SEC. 4490. The application for a new trial can be made only by the defendant, and must be made before judgment.

A new trial is a re-examination of the issue in the same court. Courts of general common law jurisdiction have al-

ways exercised the power of setting aside verdicts and granting new trials; but justice's, and all inferior courts of limited jurisdiction, have no such power, unless it be expressly conferred by statute, and no such provision is made under the Iowa Code. A new trial cannot be granted to the State in a criminal case, because the constitution forbids that any man shall be twice put in jeopardy for the same offense. But a new trial may be granted to a defendant, for he may waive the constitutional provision, which is intended for his benefit. In general, a new trial places the parties in the same position that they occupied before the trial; and the former verdict should not be referred to, either in the evidence or argument. But when the offense consists of different degrees, the defendant cannot be tried again for any degree higher than that of which he was convicted. (On this subject of re-trial, see "Former Adjudication.") A refusal to grant a continuance, upon application with sufficient cause therefor, is good ground for granting a new trial. Also the admission of illegal testimony, or the refusing to admit competent evidence. But it should appear that the defendant's rights were prejudiced, by the erroneous ruling of the court. So if the court improperly deny a party the right to cross-examine a witness, he will be entitled to a new trial. For defective verdicts, see "Verdicts."

The motion for a new trial may be in the following form:

Motion for New Trial.

STATE OF IOWA, }
VS. } In District Court of . . . county, Iowa, March term, 1878 .
. }

Now comes A B, the defendant in the above entitled cause, and asks this court to grant him a new trial herein, and set aside the verdict of the jury, for the following reasons:

- 1st. The verdict is contrary to the evidence;
- 2d. The verdict is against the law as given to the jury by the court;
- 3d. The court erred in refusing and overruling defendant's application for a continuance (or change of venue).
- 4th. The court erred in giving instructions Nos. 1, 2 and 3, and refusing those asked for by defendant, Nos. 2 and 4.

L . . . H . . . , Attorney for Defendant.

NEW TRIAL—EQUITABLE CIRCUMSTANCES.

It is evident that where a prisoner, without fault on his part, has not had a full and impartial trial, a new trial will be ordered, although no one of these circumstances amount to error in law. *State v. Trulock*, 1 Iowa, 515; *State v. Warren*, 1 G. Greene, 110; *State v. Jerry*, 1 Blackford, 395.

TIME OF FILING MOTION.

A motion for a new trial must be made in the trial court, and before judgment is rendered. *State v. Bibby*, 39 Iowa, 467.

DEFECT IN NAME IN AN INDICTMENT.

The fact that the defendant is erroneously named, is no cause for a new trial. *State v. White*, 32 Iowa, 17.

PRESENCE OF PRISONER DURING ARGUMENT OF MOTION.

While it is a better practice to have the defendant present in court on the argument of a motion for a new trial, it is not clear that it is necessary. *State v. Decklotts*, 19 Iowa, 448; *Com. v. Costello*, 121 Mass., 371; 23 Am. R., 277; *Jewell v. Com.*, 22 Pa. St., 94-101; *Com. v. Andrews*, 97 Mass., 543; while it is held in *Reg. v. Teal*, 11 East., 307, and *Reg. v. Askew*, 3 M. & S., 9; *Reg. v. Cardwell*, 2 Denio, C. C. R., 372, that the prisoner must be present on such argument for a new trial.

NEWLY DISCOVERED EVIDENCE—CUMULATIVE.

Where newly discovered evidence is mostly cumulative and sufficient diligence is not shown in procuring that testimony previous to the trial, a new trial shall not be granted. *People v. McDonnell*, 47 Cal., 134; 2 Green Cr. R., 441; *Polk v. Anderson*, 16 Kan., 247; *Smith v. Williams*, 11 Kan., 104; *State v. Kellerman*, 14 Kan., 135; *Boyd v. Sanford*, *ib.*, 280; *Heady v. Fishburn*, 3 Neb., 263; *People v. Mack*, 2 Park Cr. R., 673; *People v. O'Brien*, 4 Park Cr. R., 203. And on the ground of newly discovered evidence it is usually within the discretion of the court. *Warren v. State*, 1 G. Greene, 106; *Henderson v. State*, 1 Texas Court of Appeals R., 432.

The Iowa statutes do not authorize the granting of new trials in a criminal case, on the ground of newly discovered evidence. *State v. Bowman*, 45 Iowa, 418.

A verdict clearly against the evidence should be set aside. Much stronger should this rule apply in criminal than in civil cases. *Bedford v. State*, 5 Humph., Tenn., 532; *State v. Tomlinson*, 11 Iowa, 402. And in the consideration of the evidence, greater latitude is permitted in criminal cases than

would be countenanced in civil cases. *Com. v. Webster*, 5 Cnsh., Mass., 320; *State v. Elliott*, 15 Iowa, 76; *State v. Woolsey*, 30 Iowa, 254; *State v. Brainard*, 25 Iowa, 572.

EMBEZZLEMENT—VALUE.

Where the State proved the value to be ninety-five dollars, and the defendant showed, in his application for a new trial, that he could reduce the value to ten or fifteen dollars, but had no knowledge of this evidence at the time of trial, he was entitled to a new trial. *State v. Foster*, 37 Iowa, 405.

GRANTED FOR INSUFFICIENCY OF EVIDENCE.

To justify the setting aside of the verdict on the ground that it is not sustained by the evidence, all the testimony must be certified up. *Hall v. Hunter*, 4 G. Greene, 539; *State v. Pitts*, 11 Iowa, 343.

LIQUOR CASES—CONDEMNATION.

A proceeding by information for the condemnation of intoxicating liquors, alleged to be kept for illegal sale, is of the nature of a criminal action. And after trial and verdict for the defendant, the State is not entitled to a new trial. *State v. Certain Intoxicating Liquors and Harris*, 40 Iowa, 95.

MISCONDUCT OF JURORS—USE OF INTOXICATING LIQUORS.

At common law, the jury were kept together without meat, drink, fire, or candle, unless by permission of the judge, until they agreed. 3 Bl. Com., 375. This rule, however, has been so modified in this country that the jury may, of course, and without any special permission of the judge, have water, fire, and lights, but the permission of the judge is requisite for meat or board; but at no time has it ever been claimed, that even with the permission of the judge, could the jury have spirituous liquors, or that which at one time was regarded as almost a national drink, cider. *State v. Baldy*, 17 Iowa, 41; *Brant v. Fowler*, 7 Cow., 562. Even by consent of parties the use of liquor will vitiate the verdict. *State v. Bruce*, Jurist, Feb. 1878, page 106; *People v. Douglas*, 4 Cow, 26; 17 Iowa, 46; 9 Am. Rep., 764; *Ryan v. Harrow*, 27 Iowa, 494; 1 Am. Rep., 302; *Davis v. State*, 35 Ind., 496. But the use of liquor during trial and before retiring to consider the ver-

dict, does not necessarily vitiate the verdict, where taken for medical purposes, and when it does not appear that its effects were intoxicating, nor was not known to the defendant or his counsel at the time and before the cause was submitted to the jury. *State v. Morphy*, 33 Iowa, 273; 11 Am. R., 122; 13 Kan., 78. That one of the jurors left the room where the jury was considering the case, for a proper purpose, in the care of the deputy sheriff, with whom he had no conversation about the case, did not justify the granting of a new trial. *State v. Bowman*, 45 Iowa, 418.

ERROR IN INDICTMENT.

A judgment against a person in an indictment for larceny, will not be disturbed merely because, among the things stolen there was an item which was not the subject of larceny, if it appears by the record that the exclusion of that item could not reduce the nature of the offense nor lessen the amount of the fine. *Warren v. State*, 1 G. Greene, 106.

PRESUMPTION—ACTS OF COURT PRESUMED CORRECT.

The rulings of the court below will be presumed to be correct, unless otherwise shown. *State v. Vance*, 17 Iowa, 138.

SHOULD BE ORDERED, WHEN.

Where the verdict returned on the trial of a criminal cause, fails to pronounce affirmatively or negatively on all facts necessary to enable the court to give judgment, and where no order has been made for further deliberation, the defendant is not entitled to a discharge; but the verdict should be set aside, and a new trial ordered. *State v. Turner*, 19 Iowa, 144; *State v. Arthur*, 21 Ib., 322. So, where it lacks affirmative force. *State v. Hilton & Gordon*, 22 Iowa, 241.

CONVERSING OF JURORS AFTER VERDICT SEALED.

The fact that jurors conversed in relation to the case with other persons after their verdict was sealed, and before delivering the same to the court, was held not sufficient cause for granting a new trial. *Saunders v. State*, 2 Iowa, 230.

PRESUMPTION IN FAVOR OF REGULARITY.

The Supreme Court will presume, when the record is silent, that the jury in a criminal trial, when they retire to consider

upon their verdict, were in charge of a sworn officer. *State v. Pitts*, 11 Iowa, 343.

DISQUALIFICATION OF JUROR.

Where the defendant, in a criminal case, seeks to set aside a verdict against him, on the ground that one of the jurors, previous to the trial, had formed and expressed an unqualified opinion that he was guilty of the offense charged, he must show by the record that the juror was examined on oath, as to whether he had formed such an opinion; and if not so shown there is no ground for a new trial. *State v. Shelledy*, 8 Iowa, 477; *State v. Funk*, 17 Ib., 365. But the affidavit of the defendant is not sufficient to show that the juror was examined under oath, before he was sworn as a juror, to ascertain whether or not he had formed such an opinion. 8 Iowa, 477. Nor is the record entry that "the jury was empaneled, tried and sworn," is not sufficient to show that they were examined under oath, as to whether or not they had formed or expressed an unqualified opinion. *State v. Funk*, 17 Iowa, 365.

NOT GRANTED IF VERDICT CORRESPONDS TO THE EVIDENCE.

When the evidence upon every material charge in the indictment was before the jury, a new trial should not be granted. *Winfield v. State*, 3 G. Gr., 339. So where the verdict was a just response to the evidence, a new trial will not be granted. *State v. Stoker*, 22 Iowa, 52. But if unsupported the court will not hesitate so to do. *State v. Moffat*, 31 Iowa, 316.

GENERAL RULE.

The Supreme Court may review an order of the District Court sustaining or overruling a motion for a new trial, upon the ground that the verdict of the jury is against the evidence, but only when it is made manifest that the discretion vested in the court has been abused. *State v. Lyon*, 10 Iowa, 340; *State v. Tomlinson*, 11 Iowa, 401; *State v. Funk*, 17 Iowa, 365.

TWO VERDICTS.

In reviewing the evidence and judgment of the court below, the Supreme Court will give much weight to the fact that the judgment is sustained by two different verdicts, rendered by different juries on different trials of the same cause. *Jordan*

v. Reed, 1 Iowa, 135; *State v. Cross*, 12 Ib., 66; *Johnson v. Wilson*, adm'r, Burr, 180.

COURT SHOULD BE GUIDED.

While the court should set aside a verdict which is clearly against the evidence, and while greater latitude is allowed in the examination of motions for new trials on this ground in criminal than in civil cases, it should be well satisfied of the insufficiency of the evidence, before setting aside the verdict. The Supreme Court will exercise the power to reverse a judgment on that ground when it remains clear and evident that it should be done. *State v. Elliott*, 15 Iowa, 72; *State v. Collins*, 20 Iowa, 85.

CONFLICTING EVIDENCE.

Where the evidence is conflicting a new trial should not be granted. *State v. Funk*, 17 Iowa, 365; *State v. Polson*, 29 Iowa, 133; *State v. Lamont*, 2 Wis., 437; *Edmiston v. Garrison*, 18 Wis., 594.

HEARSAY EVIDENCE.

Where, on the trial of a criminal cause, declarations made by a third person as to the *corpus delicti*, not in the presence of the prisoner, were received as evidence, and the other evidence touching that point was not very full, a new trial was awarded. *State v. May*, 20 Iowa, 305.

ERRONEOUS INSTRUCTIONS.

An instruction which, when considered alone, would be erroneous, will not be sufficient ground of reversal, if, when taken in connection with other instructions, it could have wrought no prejudice to defendant. *State v. Johnson*, 8 Iowa, 525. So an instruction which worked no prejudice is not sufficient. *State v. Finlan*, 10 Iowa, 19. So if the instructions are erroneous, and the evidence, with the law given, would sustain the verdict, it is no ground for reversal. *State v. Cooster*, 10 Iowa, 453.

REFUSAL TO GIVE INSTRUCTIONS.

The refusal of unobjectionable instructions, where the record does not contain all the instructions given, is no ground for a reversal. *State v. Johnson*, 19 Iowa, 230.

DUTY OF COURT TO INSTRUCT.

In a criminal cause, where the case is complicated, it is the duty of the court, whether requested by counsel or not, to point out the issues of fact to the jury, and give them the law applicable in proper instructions. Where this is not done, and the verdict is not clearly warranted by the evidence, a new trial will be awarded. *State v. Tweedy*, 11 Iowa, 350; *State v. Carnahan*, 17 Iowa, 256; *State v. Benham*, 17 Iowa, 23; *Ib.*, 154; *State v. Brainard*, 25 Iowa, 572.

DISCRETIONARY POWER.

The granting or refusing a new trial is a matter within the discretion of the court, and the Supreme Court will not interfere with the exercise of that discretion except in cases of gross abuse thereof. *Hoove v. Lockwood*, 3 Chand., Wis., 41; *State v. Lamont*, 2 Wis., 437; *Ford v. Ford*, 3 Wis., 399; *Schaeffler v. State*, 3 Wis., 823; *Cook v. Helms*, 5 Wis., 107; *Barnes v. Merrick*, 6 Wis., 57; *Chamberlain v. M. & M. R. R. Co.*, 7 Wis., 425; 14 Wis., 356 and 687.

GAMBLING VERDICT.

Where the verdict is the result of chance or hazard and not of deliberation, the same must be set aside and a new trial granted. *Birchard v. Booth*, 4 Wis., 67.

ADMISSION OF ILLEGAL EVIDENCE.

The admission of illegal testimony against the prisoner, upon his objection, is a good cause for a new trial. *Com. v. Green*, 2 Leading Cr. Cases, 464.

STATE NOT ENTITLED TO NEW TRIAL.

No new trial can be had by the State when the defendant is acquitted. *Reg. v. Jacob*, 1 Stark, Nevile & Perry Q B., 516; 2 E. C. L. R.; *Rex v. Sutton*, 5 B. & Ad., 52; 27 E. C. L. R.; Roscoe's Cr. Ev., 7th ed., 227. Nor does a writ of error lie in behalf of the Commonwealth to reverse an acquittal, unless expressly given by statute; nor can a new trial be granted in such case. Cooley's Constitutional Lim., marginal page 322.

AFFIDAVIT OF COUNSEL AS TO INFORMATION RECEIVED.

The affidavit of counsel as to information he received from

jurors concerning what took place in the jury room is inadmissible. *Wilson v. People*, 4 Park Cr. Rep., 619.

For causes and laws on new trials in criminal cases generally, see "Hilliard on New Trials," 2d ed., 113, and authorities therein cited.

PARDONS AND THE REMISSION OF FINES AND FORFEITURES

SECTION 4712. The governor shall have power to remit fines and forfeitures upon such conditions and with such restrictions and limitations as he may think proper. After conviction of murder in the first degree no pardon shall be granted by the governor until he shall have presented the matter to, and obtained the advice of, the general assembly thereon. Before presenting the matter to the general assembly for their action, he shall cause a notice containing the reasons assigned for granting the pardon to be published in two newspapers of general circulation, one of which shall be published at the capital and the other in the county where the conviction was had, and if there be no such paper in such county, then in some adjoining county, for four successive weeks, the last publication to be at least twenty days prior to the commencement of the session of the general assembly to which the matter shall be presented.

SEC. 4713. When an application is made to the governor for a pardon, reprieve, or commutation, or for the remission of a fine or forfeiture, he may require the judge of the court, or the district attorney, or attorney general, by whom the action was prosecuted, or the clerk of such court, to furnish him without delay a copy of the minutes of the evidence taken on the trial, and of any other facts having reference to the propriety of his exercise of his powers in the premises. He may also take the testimony of such persons bearing upon such application as he may deem advisable, and for this purpose is authorized to administer the necessary oath. Any person who, in giving such testimony, shall swear falsely, and any person who shall knowingly and corruptly make any false statements in an affidavit intended to be used in connection with an application for pardon, or for remission of fine or forfeiture, shall be deemed guilty of perjury, and shall be punished therefor as provided by law.

SEC. 4714. Whenever any convict is pardoned, or reprieved, or his sentence commuted, or any fine or forfeiture is remitted, it is the duty of the officer to whom the warrant is directed, as soon as may be after executing the same, to make

a return in writing thereon to the secretary of state, of his doings under the same, and sign the same with his name of office, and must also file in the office of the clerk of the court in which the conviction was had, or in which it was to have been enforced, a certified copy of the warrant and return, the proper entries in relation to which shall be made by such clerk.

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. 7 Pet. S. C. Rep., 160. Every pardon granted to the guilty is in derogation of the law; if the pardon be equitable, the law is bad; for where legislation and the administration of the law are perfect, pardons must be a violation of the law. But as human actions are necessarily imperfect, the pardoning power must be vested somewhere in order to prevent injustice, when it is ascertained that an error has been committed. The subject will be considered with regard: 1. To the kinds of pardons; 2. By whom they are to be granted; 3. For what offenses; 4. How to be taken advantage of; 5. Their effect.

1. Pardons are general or special. (1) A general pardon is implied by the repeal of a penal statute, because unless otherwise provided by law, an offense against such statute while it was in force cannot be punished and the offender goes free. (2) Special pardons are those which are granted by the pardoning power for particular cases. Pardons are also divided into absolute and conditional. The former are those which free the criminal without any condition whatever; the latter are those to which a condition is annexed, which must be performed before the pardon can have any effect. *Ely v. Hallett*, 2 Caines R., 57; 1 Bailey, 283; 2 Bailey, 516. But see 4 Call. R., 35.

2. The constitution of the United States gives to the President in general terms, "the power to grant reprieves and pardons for offenses against the United States." The same power is given generally to the Governors of the several States to grant pardons for crimes committed against their respective States, but in some of them the consent of the Legislature, or one of its branches, is required.

3. Except in the case of impeachment, for which a pardon cannot be granted, the pardoning power may grant a pardon of all offenses against the government, and for any sentence or judgment. But such a pardon does not operate to discharge the interest which third persons may have acquired in the judgment; as, where a penalty was incurred in violation of the embargo laws, and the custom house officers became entitled to one-half of the penalty, the pardon did not discharge that. 4 Wash. C. C. R., 64; see 2 Bay., 565; 2 Whart., 440; 7 J. J. Marsh, 131.

4. When the pardon is general, either by an act of amnesty or by the repeal of a penal law, it is not necessary to plead it, because the court is bound, *ex officio*, to take notice of it. And the criminal cannot even waive such pardon, because by his admittance no one can give the court power to punish him, when it judicially appears that there is no law to do it. But when the pardon is special, to avail the criminal it must judicially appear that it has been accepted, and for this reason it must be specially pleaded. *U. S. v. Wilson*, 7 Pet. R., 150, 162.

5. The effect of a pardon is to protect from punishment the criminal for the offense pardoned, but for no other. 1 Porter, 475. It seems that the pardon of an assault and battery, which afterwards becomes murder by the death of the person beaten, would not operate as a pardon for the murder. 12 Pick., 496. In general the effect of a full pardon is to restore a convict to all his rights. But to this there are some exceptions: 1. When the criminal has been guilty of perjury, a pardon will not qualify him to be a witness at any time afterwards. 2. When one was convicted of an offense by which he became civilly dead, a pardon did not affect or annul the second marriage of his wife, nor the sale of his property by persons appointed to administer on his estate, nor divest his heirs of the interest acquired in his estate in consequence of his civil death. *Deming v. Daniels*, 10 Johns., 232, 483.

6. All contracts made for the buying or procuring a pardon for a convict are void. And such contracts will be declared null by a court of equity, on the ground that they are opposed to public policy. 4 Bouv. Inst., 3857.

The petition for pardon may be in the following form.

THE STATE OF IOWA } Indicted and convicted in the District Court of . . county,
vs. } Iowa, at the June term thereof, A. D. 187 . . , on a charge
. } of grand larceny.

To his excellency, the Governor of Iowa:

We, the undersigned, do respectfully represent, that Mark Duryee, the above named defendant, was indicted, tried and convicted, at the June term of the District Court for Linn county, Iowa, on the charge of grand larceny. And in pursuance of said conviction was, by the Hon. John Shane, Judge of said court, sentenced to confinement, at hard labor, in the penitentiary at Anamosa, Jones county, Iowa, for the term of two years; that he has served in said prison, in pursuance of said sentence, from the 20th of June 1876, up to this date. And we have reason to, and do, believe that the said defendant was illegally and improperly convicted; for that he was convicted on the evidence of A B and C D, who were the only witnesses appearing in behalf of the prosecution, as will fully appear by the certificate of the trial judge and prosecuting attorney, which certificate is hereto attached and made a part of this application, and that the conviction was had solely on the evidence of said A B and C D. Whereas, in fact, and in truth, neither of said witnesses were within the county, or State, when and where the said pretended offense should have been committed by said defendant, and they had no knowledge or reason to believe the said defendant guilty of the crime charged, as will fully appear by the affidavits of competent and disinterested parties; which said affidavits are hereto attached, and made a part hereof. Wherefore, your petitioners would pray that this application be properly examined, and, upon the facts being found to be true, as herein stated, that said defendant be discharged from custody.

(Signatures.)

Marion, Iowa, July 16, 1877.

Form of Pardon.

THE STATE OF IOWA }
v. } *The State of Iowa, Executive Department.*
. }

Whereas, at the June term of the District Court of . . . county, Iowa, 187 . . , Mark Duryee was then and there convicted upon a charge of grand larceny, and sentenced by the court thereof to imprisonment in the Iowa penitentiary for the term of two years, at Anamosa, by virtue of which sentence he is now confined therein. And, whereas an application for pardon has been made to me, with affidavits, certificates, and evidence furnished which induce the belief that the said Mark Duryee may, with propriety, be pardoned by the executive authority of the State. Therefore I, John H. Gear, Governor of the State of Iowa, do hereby grant the said Mark Duryee a general pardon from the sentence aforesaid, and do by these presents release him from all further confinement in said penitentiary in consequence thereof: and do hereby restore him to all the rights and privileges of citizenship.

In testimony whereof, I have hereunto subscribed my name, and caused the great seal of the State of Iowa to be affixed, at Des Moines, the 3d day of July, 187 . .

By the Governor,

JOHN H. GEAR.

JOSIAH T. YOUNG, *Secretary of State.*

Form of Commutation of Sentence.

THE STATE OF IOWA }
v. }
. }

It appearing to the executive that Mark Duryee, now confined in the penitentiary at Anamosa, under sentence of the District Court of Linn county, Iowa, on a charge of "grand larceny," is a fit subject of commutation of sentence: Therefore, I, John H. Gear, have in pursuance of the authority vested in the executive by law, thought proper to commute, and do hereby commute the punishment of the said Mark Duryee from imprisonment in the penitentiary, from two years to one year, to-wit: for the term of twelve months from date.

Given under my hand as Governor, and the seal of said State this 30th day of June, 187 . .

By the Governor,

JOHN H. GEAR.

JOSIAH T. YOUNG, *Secretary of State.*

COSTS.

A general pardon from the executive to a convict does not

operate as a remission of any judgment for costs against him. *Estep v. Lacey*, 35 Iowa, 419; 2 Green Cr. R., 634; 14 Am. R., 498; *Libby v. Nichols*, 21 O. St., 414; *Com. v. Anglea*, 10 Gratt., 696; *People v. Pease*, 3 Johns. Cases, 334. Nor can the governor remit the costs of prosecution. *State v. Farley*, 8 Blackf., 229.

GENERAL AND CONDITIONAL.

The power conferred upon the executive by the constitution to grant pardon includes the power of granting a conditional pardon. *People v. Potter*, 1 Park Cr. R., 47; *Addington's Case*, 2 Bail., 516; *Mary Fuller's Case*, 1 McCord, 178; *State v. Twitty*, 4 Hawks, N. C. R., 193; 7 Pet. U. S. R., 175; Opinions of Attorneys General, 250; 2 Caines, 57; 3 Johnson's Cases, 333.

CONDITIONAL PARDONS.

The executive has the constitutional power to grant conditional pardons. 1 Ch. Cr. L., 714; 2 Hawkins P. C., title Pardon; 1 Leach Cr. L., 223 and 393; 4 Blackstone Com., 401; *Lee v. Murphy*, 22 Vir., 789; 12 Am. R., 563; *People v. Potter*, 1 Edmonds, N. Y., 235. The Governor of the State, in the exercise of his pardoning power, may annex to his pardon any condition, precedent or subsequent, provided it be not illegal, immoral, or impossible to be performed. *Arthur v. Craig*, Warden of Iowa Penitentiary, Western Jurist, July No., 1878, page 430.

EFFECT OF PARDON.

Under the New York statute, where the prisoner is pardoned both of the offense and the penalties, he is not restored to the rights of citizenship unless, by the terms of such pardon, he shall be so restored. 1 R. S., 127; *People v. Potter*, 1 Park Cr. R., on page 52; *State v. Twitty*, 4 Hawk., N. C. R., 193.

VIOLATION OF CONDITIONS OF PARDON ON PART OF PRISONER.

A pardon may be extended on any condition, precedent or subsequent, on the performance of which the validity of the pardon will depend, and if he does not perform the conditions it will be altogether void, and he may be brought to the bar and suffer his original sentence. *People v. Potter*, 1 Park

Cr. R., on pages 57 and 58; *Commonwealth v. Haggerty*, 4 Brewster, Penn., 326; 1 Green Cr. R., 180; 18 How. U. S., 307; *U. S. v. Wilson*, 7 Pet., 160; Kent's Com., 297. When a conditional pardon is granted which expressly provides that the Governor may, by his warrant, revoke it upon such showing of a violation of the condition as he may deem sufficient, upon such revocation the legal status of the prisoner is the same as it was before it was granted. *Arthur v. Craig*, Western Jurist, July No., 1878, page 430.

FAILURE ON PART OF DEFENDANT TO COMPLY WITH THE CONDITIONS PROHIBIT HIS BEING A WITNESS.

In carrying out this principle it is held that a party is not restored to competency as a witness until he has performed the conditions. Leach's Cr. Law, 454, 498; 2 Hale P. C., 278; *Commonwealth v. Haggerty*, 4 Brewster, Penn., 326; 1 Gr. Cr. R., 180.

AUTHORITY OF EXECUTIVE IN GRANTING PARDONS.

Under the constitution of Indiana of 1852, the Governor cannot grant pardons and remissions without a law prescribing the mode and conditions thereof. *State v. Dunning*, 9 Ind., 20.

FRAUD VITIATES.

Fraud vitiates a pardon or remission; and where it appears that the executive was deceived or imposed upon by those procuring it, by false statements or an omission to state relevant facts, the pardon or remission is void. *State v. Leak*, 5 Ind., 359.

MAY BE GRANTED BEFORE SENTENCE.

Under the Massachusetts Constitution, Chap. 2, Sec. 1, Art. 8, the Governor may grant a pardon of an offense after a verdict of guilty, and before sentence, and while exceptions are allowed by the trial judge, and cause pending in Supreme Court. *Commonwealth v. Lockwood*, 109 Mass., 323; 1 Green Cr. R., 168; 12 Am. R., 699.

REASONABLE CONDITION.

A condition that the defendant leave the country forthwith, is a reasonable condition. Such a condition means a depart-

ure and permanent absence from the country during at least the term of sentence. *Com. v. Haggerty*, 4 Brewster, Penn., 326; 1 Gr. Cr. R., 180.

RESTORATION TO RIGHTS OF CITIZENSHIP WITHOUT PARDON VOID.

An instrument by the Governor purporting to restore to the defendant the rights of citizenship, without a pardon, is of no validity and void, as a prisoner must be pardoned from the penalty of the crime of which he was convicted before the rights of citizenship can take place. *People v. Bowen*, 43 Cal., 439; 1 Gr. Cr. R., 185; 13 Am. R., 148.

POWER TO PARDON BEFORE CONVICTION.

The exercise of the power of pardon before conviction by the legislature is held not unconstitutional. *State v. Nichols*, 27 Ark., 74; 7 Am. R., 600.

GOVERNOR'S POWER TO PARDON PENDING AN APPEAL.

Where a Governor was authorized to grant pardons "after conviction," it was held that a pardon after verdict and judgment but pending an appeal taken by the prisoner, was valid. *State v. Alexander*, 76 N. C., 231; 22 Am. R., 675.

IN CASES OF CONTEMPTS OF COURTS.

The Governor of a State has power to pardon a prisoner confined for contempt of court. It is well settled that the President of the United States is clothed with the power to grant pardons in cases where judges of the United States Courts punish for contempt; and no exception is made to a Governor. Opinions of Attorneys General, Vol. 4, 458, and Vol. 5, 579; Blackford's Circuit Court R., Vol. 7, 24; 24 La. Ann., 119; 13 Am. R., 115; S. & M. R., Vol. 4, 751; Blackstone, Vol. 4, 231.

REMISSION OF FINE BY LEGISLATURE.

Whether the legislature can constitutionally remit a fine, when the pardoning power is vested in the Governor by the constitution has been made a question. The cases of *People v. Birchan*, 12 Cal., 50, and *Haley v. Clark*, 26 Ala., 439, are opposed to each other upon this point. It is said if the fine is payable to the State, perhaps the legislature should be considered as having the same right to discharge it that they

would have to release any other debtor to the State from his obligation.

REPRIEVE—PARDON.

The power to reprieve is not included in the power to pardon. *Ex parte Howard*, 7 N. H., 545.

This authority, however, would not apply under the constitution and laws of Iowa, as the executive has the authority both to pardon and reprieve; the same is true of most of the States.

EVIDENCE, ADMISSIBILITY OF.

Parol evidence is admissible to show that a pardon to a witness who had been convicted of felony was intended to apply to that offense, where the pardon does not clearly state the offense. 5 N. Y. Leg. Obs., 19.

PLEAS TO THE INDICTMENT.

SECTION 4359. There are but three pleas to an indictment. A plea of:

1. Guilty;
2. Not guilty;
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty.

SEC. 4360. The plea may be entered on the record, substantially, in the following form:

1. A plea of guilty. "The defendant pleads that he is guilty of the offense charged in the indictment."

2. A plea of not guilty. "The defendant pleads that he is not guilty of the offense charged in the indictment."

3. A plea of former conviction or acquittal. "The defendant pleads that he has formerly been convicted or acquitted, (as the case may be), of the offense charged in the indictment, by the judgment of the court of (naming it), rendered on the day of, A. D. 18.. (naming the time)."

SEC. 4361. The plea of guilty can only be put in by the defendant himself in open court.

SEC. 4362. At any time before judgment, the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted.

SEC. 4363. The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact

may be given in evidence under it, except a former conviction or acquittal.

SEC. 4364. A conviction or acquittal by a judgment upon a verdict, shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment on which the conviction or acquittal took place.

SEC. 4365. When the defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein.

SEC. 4366. The judgment for the defendant on a demurrer, except when it is otherwise provided, or for an objection to its form, or substance taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense.

SEC. 4367. If the defendant fail or refuse to answer the indictment by demurrer or plea, a plea of not guilty must be entered by the court.

MOTION OVERRULED—MUST PLEAD WITHOUT FURTHER DELAY.

Where a motion to set aside an indictment is overruled, the defendant must immediately demur or plead thereto. *State v. Morris*, 36 Iowa, 272.

PLEA OF GUILTY MAY BE WITHDRAWN AND A PLEA OF NOT GUILTY SUBSTITUTED.

The court may, at any time before judgment, upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted by the defendant. Section 2961, Code of 1851. The same section was carried into the Revision, section 4717; also, into the Code of 1873, section 4362. Under these sections the courts hold that the defendant has a right to withdraw his plea of guilty and substitute a plea of not guilty. *State v. Kraft*, 10 Iowa, 330; *State v. Oehlschlager*, 38 Iowa, 297; and may also withdraw a plea of not guilty for the purpose of filing a motion to set aside the indictment. *State v. Madam Hale*, 44 Iowa, 96.

AFTER SENTENCE PLEA CANNOT BE WITHDRAWN.

Where a defendant has plead guilty to a charge, and sentence passed, he cannot withdraw his plea. *Reg. v. Sell*, 9 Carr. & P., 346.

PLEADING BY THE DEFENDANT.

SECTION 4345. The only pleading on the part of the defendant is a demurrer or plea.

SEC. 4346. The demurrer and plea must be put in in open court, and may be oral; but an entry thereof must be made on the record.

POWERS AND DUTIES OF THE GRAND JURY.

SECTION 4272. The grand jury has power, and it is made its duty, to inquire into all indictable offenses committed, or which may be tried, within the county and present them to the court by indictment.

SEC. 4273. The indictment must in all cases be found only upon evidence given by witnesses produced, sworn and examined before the grand jury, or furnished by legal documentary evidence.

SEC. 4274. The grand jury has power, by its foreman, to administer the oath to all witnesses produced and examined before it.

SEC. 4275. It is the duty of the grand jury to appoint one of its number, who is not foreman, clerk thereof, who must take and preserve the minutes of the proceedings and of the evidence given before it, except the votes of the individual members thereof on finding an indictment.

SEC. 4276. The grand jury is not bound to hear evidence for the defendant, but it is its duty to weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it may order such evidence to be produced.

SEC. 4277. If a member of the grand jury knows, or has reason to believe that a public offense has been committed, triable in the county, he must declare the same to his fellow jurors, and be sworn as a witness upon the investigation before them.

SEC. 4278. It is made the special duty of the grand jury to inquire:

1. Into the case of every person imprisoned in the jail of the county on a criminal charge and not indicted;
2. Into the condition and management of the public prisons within the county;
3. Into the willful and corrupt misconduct in office of all county officers;
4. Into the obstruction of highways.

SEC. 4279. The clerk of the court must, whenever required by the foreman of the grand jury or district attorney, issue subpoenas for witnesses to appear before the grand jury.

SEC. 4280. The jury is entitled to free access at all reasonable times to the county jails, and to the examination without charge, of all public records within the county.

SEC. 4281. The grand jury may, at all reasonable times, ask the advice of the district attorney, or the court; and the district attorney may attend before it for the purpose of examining witnesses when the grand jury deems it necessary.

SEC. 4282. Such attorney shall be allowed at all times to appear before the grand jury on his own request, for the purpose of giving information relative to any matter cognizable by it; but no such attorney, nor any other officer or person, except the grand jury, must be present when the question is taken upon the finding of an indictment.

SEC. 4283. The grand jury should find an indictment when all the evidence before it, taken together, is such as, in its own judgment, would, if unexplained, warrant a conviction by the trial jury. When the evidence is not such, it should not.

SEC. 4284. Every member of the grand jury must keep secret the proceedings of that body and the testimony given before them, except as hereinafter required. Nor shall any grand juror or officer of the court disclose the fact that an indictment for a felony has been found against any person not in custody or under bail, otherwise than by presenting the same in court, or issuing or executing process thereon, until such person has been arrested. A violation of this section is a misdemeanor.

SEC. 4285. A member of the grand jury may be required by the court to disclose the testimony of a witness examined before them, for the purpose of ascertaining whether it is consistent with that given by the witness before court, or to disclose the testimony given before them by any witness upon a charge against him of perjury.

SEC. 4286. No grand juror shall be questioned for anything he may say, or any vote he may give, in the grand jury relative to a matter legally pending before them, except for perjury of which he may have been guilty in making an accusation, or in giving testimony to his fellow jurors.

SEC. 4287. When a witness under examination before the grand jury, refuses to testify or to answer a question put to him by the grand jury, the grand jury shall proceed with the witness into the presence of the court, and the foreman shall then distinctly state to the court the refusal of the witness, and, if the court, upon hearing the witness, shall decide that he is bound to testify, or answer the question propounded, he shall inquire of the witness if he persists in his refusal, and if he does, shall proceed with him as in cases of similar refusal in open court.

SEC. 4288. If a witness fail to attend before the grand jury, in obedience to a subpoena issued for that purpose and duly served, the court shall, upon the application of the district attorney, or foreman of the grand jury, proceed and coerce the attendance of the witness, and may punish his disobedience as in the case of a witness failing to attend on the trial.

SEC. 4289. All the papers and other matters of evidence relating to the arrest and preliminary examination of the charge against defendants who have been held to answer, returned to the court by magistrates, shall be laid before the grand jury, and if, upon investigation, it refuses to find an indictment, they must be returned to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed, and thereupon the court must order the discharge of the defendant from custody, if in jail, or the exoneration of the bail, if bail be given, unless the court should, upon good cause shown, be of opinion that the charge should again be submitted to the grand jury, in which case the defendant may be continued in custody, or on bail, until the next term of the court.

SEC. 4290. Such dismissal of the charge does not prevent the same from being again submitted to a grand jury as often as the court may direct; but without such direction it cannot again be submitted.

WITNESS COMPELLED TO ANSWER WHEN THE ANSWER DOES NOT CRIMINATE HIMSELF.

Under section 4287, Code of 1873, a witness before the grand jury is bound to answer questions propounded to him, where the answer does not tend to criminate himself. *State v. Richman*, 2 G. Greene, 532. Nor is a peace officer excused from answering like questions on the same grounds. *State v. Hunt*, 20 Iowa, 21.

POLICE AND CITY COURTS.

SECTION 4707. The proceedings in police and city courts in incorporated cities and towns, in criminal cases within their jurisdiction, shall be regulated by the provisions of this code, when not otherwise regulated by law.

For trials before justices, see "Proceedings and Trials before Justices of the Peace;" and for police courts, see "Mayor and his Jurisdiction."

PROCEEDINGS AND TRIALS BEFORE JUSTICES OF THE PEACE.

SECTION 4660. Justices of the peace have jurisdiction of, and must hear, try, and determine all public offenses less than felony, committed within their respective counties, in which the punishment described by law does not exceed a fine of one hundred dollars, or imprisonment thirty days.

SEC. 4661. Criminal actions for the commission of a public offense must be commenced before a justice of the peace, by an information subscribed and sworn to, and filed with the justice.

SEC. 4662. Such information must contain:

1. The name of the county and of the justice where the information is filed;
2. The names of the parties, if the defendants be known, and if not, then such names as may be given him by the complainant;
3. A statement of the acts constituting the offense, in ordinary and concise language, and the time and place of the commission of the offense as near as may be.

SEC. 4663. The information may be substantially in the following form:

.....county,	} Before justice..... (here insert the name of the justice).
The State of Iowa,	
against	
A.... B...., defendant.	

The defendant is accused of the crime (here name the offense).

For that the defendant on the day of, A. D. 18.., at the (here name the city, village, or township), in the county aforesaid (here state the act or omission constituting the offense as in an indictment).

SEC. 4664. The justice must file such information, and mark therein the time of filing the same.

SEC. 4665. Immediately upon the filing of such information, the justice may, in his discretion, issue a warrant for the arrest of the defendant, directed in the same manner as a warrant of arrest upon a preliminary information, and may be served in like manner.

SEC. 4666. The officer who receives the warrant must serve the same by arresting the defendant, if in his power, and bringing him without unnecessary delay before the justice who issued the same.

SEC. 4667. When the defendant is brought before the justice, the charge against him must be distinctly read to him,

and he shall be asked whether he is presented by his right name, and be required to plead. If he objects that he is wrongly named in the information, he must give his right name, and if he refuses to do so, or does not object that he is wrongly named, the justice shall make an entry thereof in his docket, and he is thereafter precluded from making any such objection.

SEC. 4668. The defendant may plead the same pleas as upon an indictment. His pleas must be oral, and shall be entered on the docket of the justice.

SEC. 4669. Upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the justice must proceed to try the issue, unless a change of venue be applied for by the defendant.

CHANGE OF VENUE.

SEC. 4670. If a change of venue be applied for, an affidavit must be filed stating that the justice is prejudiced against the defendant, or is of near relation to the prosecutor upon the charge, or the party injured or interested, or is a material witness for either party, or that the defendant cannot obtain justice before him, as the affiant verily believes.

SEC. 4671. If such affidavit be filed the change of venue must be allowed, and the justice must immediately transmit all the original papers, and a transcript of all his docket entries in the case to the next nearest justice in the township, unless said justice be a party to the action, or is related to either party by consanguinity or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding, and in such case the justice before whom such action or proceeding is commenced shall transmit all the original papers, together with a transcript of all his docket entries, to the next nearest justice in the county against whom none of the above objections exist, who may require the defendant to plead as provided in section four thousand six hundred and sixty-seven of this chapter, if he has not already done so, and shall proceed to try the case, unless a jury trial be demanded, but no more than one change of venue in the same case shall be allowed.

SELECTION OF JURY.

SEC. 4672. Before the justice has heard any testimony upon the trial, the defendant may demand a trial by jury.

SEC. 4673. If a trial by a jury be demanded, the justice shall direct any peace officer of the county to make a list in writing of the names of eighteen inhabitants of the county having the qualifications of jurors in the district court, from

which list the prosecutor and defendant may each strike out three names.

SEC. 4674. In case the prosecutor or the defendant neglect or refuse to strike out such names, the justice shall direct some disinterested person to strike out the names for either or both of the parties so neglecting or refusing, and upon such names being struck out, the justice must issue a venire directed to any peace officer of the county, requiring him to summon the twelve persons whose names remain upon the list, to appear before such justice at the time and place named therein, to make a jury for the trial of the cause.

SEC. 4675. The officer to whom such venire is delivered must forthwith summon such jurors, and return the venire to the justice within the time therein specified, naming the persons summoned and the manner of service.

SEC. 4676. The names of the persons returned as jurors shall be written on separate ballots, folded each in the same manner as nearly as possible, and so that the name be not visible, and shall, under the direction of the justice, be deposited in a box or other convenient thing.

SEC. 4677. The justice must then draw out six of the ballots successively, and if any of the persons whose names are drawn do not appear, or are challenged, or are set aside, such further number must be drawn as will make a jury, of six, after all legal challenges have been allowed.

SEC. 4678. The same challenge may be taken by either party to any individual juror as on the trial of an indictment for a misdemeanor, but no challenge to the panel is allowed.

SEC. 4679. If any of the jurors named in the venire cannot be found, or do not attend, or are challenged by either party, so that a sufficient number cannot be obtained, the justice may direct the officer to summon any bystander or others who may be competent, and against whom no sufficient cause of challenge appears, to act as jurors.

SEC. 4680. If the officer by whom the venire is received, do not return it as required, he may be punished by the justice as for contempt, and the justice shall issue a new venire for the summoning of the same jurors, upon which the same proceeding shall be had as upon the one first issued.

SEC. 4681. When six jurors appear and are accepted, they shall constitute the jury.

SEC. 4682. The justice must thereupon administer to them the following oath or affirmation: You do swear (or you do solemnly affirm, as the case may be), that you will well and truly try the issue between the state of Iowa and the defendant, and a true verdict give according to the evidence.

TRIAL AND JUDGMENT.

SECTION 4683. After the jury are sworn, they must sit together and hear the proofs and allegations of the parties, which must be delivered in public. After which, they may either decide in court or retire for consideration.

SEC. 4684. If they do not immediately agree they must retire with the officer, who shall be sworn to the following effect: "You do swear that you will keep the jury together in some private and convenient place, without meat or drink, unless otherwise ordered by the court; that you will not permit any person to speak to them, nor speak to them yourself, unless it be to ask them whether they have agreed upon a verdict, and that you will return them into court when they have so agreed."

SEC. 4685. When the jury have agreed upon their verdict, they must deliver it publicly to the justice, who shall enter it on his docket.

SEC. 4686. The jury must be kept together after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless, for good cause, the justice sooner discharge them.

SEC. 4687. If the jury be discharged as provided in the last section, the justice may proceed again to the trial in the same manner as upon the first trial; and so on till a verdict is rendered.

SEC. 4688. When the defendant pleads guilty, or is convicted, either by the justice or by a jury, the justice shall render judgment thereon, of fine, or imprisonment, as the case may require, being governed by the rules prescribed for the district court, as far as the same are applicable, in rendering such judgment.

SEC. 4689. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied.

SEC. 4690. When the defendant is acquitted, either by the justice, or by a jury, he must be immediately discharged.

SEC. 4691. When the defendant is acquitted, the justice shall, if he is satisfied that the prosecution is malicious or without probable cause, tax the costs against the prosecuting witness and render judgment therefor, from which he may appeal to the district court, by there giving notice to the justice that he claims such appeal, and the fact of the giving such notice shall be entered on his record by the justice. If notice of appeal is given as herein contemplated, the justice shall, without delay, make out, sign, and file in the case a full and true statement of all the testimony admitted on the trial and on which he bases his finding that the prosecution was malicious or without probable cause, and shall, without delay, make out a transcript of his docket entries, and shall

file it, together with the statement of the testimony as aforesaid, and all other papers on file in the case, in the clerk's office of the district court of the county. And such appeal shall stand for hearing in said court at the term thereof commencing next after said papers are filed. And said court shall have full power to compel the correction by said justice of any error made apparent in his transcript, said statement of testimony, or in any papers returned by him, or may itself make the necessary correction therein, and may, on the papers, in case they shall be submitted to it, either affirm or reverse the judgment of the justice, or render such judgment as the justice should have rendered in the case.

SEC. 4692. Whenever a conviction is had upon a plea of guilty, or upon trial, the justice must make and sign with his name of office, a certificate of such conviction, in which it shall be sufficient briefly to state the offense charged and the conviction and judgment thereon, and if any fine has been collected, the amount thereof.

SEC. 4693. The judgment shall be executed by a peace officer of the county where the conviction is had, by virtue of a warrant under the hand of the justice specifying the particulars of such judgment.

SEC. 4694. If a fine be imposed, and paid before commitment, it shall be received by the justice, and by him paid over to the county treasurer, within thirty days after the receipt thereof, for the use of the schools of the county, as provided by law.

SEC. 4695. If the defendant be committed for not paying a fine, he may pay it to the sheriff of the county, but to no other person, who must in like manner, within thirty days after the receipt thereof, pay it into the county treasury, for the use of the schools in the county, as provided by law.

SEC. 4696. If the fine, or any part thereof, is paid to the justice or sheriff, he must execute duplicate receipts therefor, one of which he must file without delay with the county auditor.

SEC. 4697. The justice rendering a judgment against the defendant must inform him of his right to an appeal therefrom, and make an entry on the docket of the giving of such information, and the defendant may thereupon take an appeal, by giving notice orally to the justice that he appeals, and the justice must make an entry on his docket of the giving of such notice.

SEC. 4698. The justice must thereupon enter an order on his docket, fixing the amount in which bail may be given by the defendant, and the execution of the judgment against the defendant shall not be stayed, unless bail in that amount be put in, by an undertaking substantially in the following form:

County of.....

A B, having been convicted before C D, a justice of the peace of said county, of the crime of (here designate it generally as in the information), by a judgment rendered on theday of, A. D. 18—, and having appealed from said judgment to the district court of said county:

We, A B and E F (or I, E F) or (we, E F and G H), hereby undertake that the said A B will appear in the district court of said county, at the term thereof to which the appeal is returnable, and abide the judgment of said court, and not depart without leave of the same, or that we (or I, as the case may be) will pay to the State of Iowa the sum ofdollars (the amount of bail fixed).

A. B.

E. F.

(As the case may be.)

Acknowledged before and accepted by me, at, in the township of, thisday of, 18—.

C. D.,

Justice of the Peace.

SEC. 4699. The bail must possess the qualifications, must justify, and must be taken in the same manner prescribed in chapter thirty-eight of this title, and the same proceedings had in all respects, as nearly as applicable, except as in this chapter otherwise provided.

SEC. 4700. The bail may be taken by the justice who rendered the judgment, or by any magistrate in the county who has authority to admit to bail, or by the district court or the clerk thereof.

SEC. 4701. When an appeal is taken, the justice must cause all material witnesses to enter into an undertaking, as in a case where a defendant is held to answer on a preliminary examination, to appear and testify on the trial of the appeal in the district court, at the term at which it is returnable, and shall, as soon as practicable, and at least ten days before the first day of such term of the district court of the county, file in the office of the clerk thereof a certified copy of the entries on his docket, together with all the undertakings and papers in the case.

TRIAL IN DISTRICT COURT.

SEC. 4702. The cause, when thus appealed, shall stand for trial anew in the district court, in the same manner that it should have been tried before the justice, and as nearly as practicable as an issue of fact upon an indictment, without regard to technical errors or defects which have not prejudiced

the substantial rights of either party; and the court has full power over the case, the justice of the peace, his docket entries, and his return, to administer the justice of the case according to the law, and shall give judgment accordingly.

SEC. 4703. No appeal from the judgment of a justice of the peace in a criminal case shall be dismissed.

SEC. 4704. If any proceedings be necessary to carry the judgment upon the appeal into effect, they shall be had in the district court.

SEC. 4705. Either party may appeal from the judgment of the district court to the supreme court, in the same manner as from a judgment in a prosecution by indictment, and the defendant may be admitted to bail in like manner, and similar proceedings shall be had on the appeal in all respects, as nearly as applicable.

SEC. 4706. The same proceeding shall be had to carry into effect the judgment of the Supreme Court upon the appeal, as if it had been taken from a judgment prosecuted by indictment.

In relation to practice before justices of the peace, we might say that the Code clearly defines the duties of justices except in a few instances, and the forms for informations will be found under the head of various crimes arranged in alphabetical order. When a defendant is brought before the justice he should read, or cause to be read, to the defendant, the information filed, and in this respect comply with section 4226, Preliminary Examinations, and fully inform the prisoner of the charges against him and his right to counsel and time for trial, as the law does not intend that a defendant shall be rushed into trial without knowing what he is to defend against, and if time is demanded a reasonable time should be granted him, and what is a reasonable time is to be determined under the particular circumstance of each case, for instance if the defendant is arrested and brought before a justice near his home and where all of his witnesses, if any, reside, and an opportunity to procure counsel without delay, as much time should not be taken as where the defendant is taken before a justice a distance from his place of residence, and probably ten or twenty miles from an attorney; these and like circumstances should be taken into consideration by the court in fixing the time. It is by some justices believed to be the law that when time is thus fixed at a certain hour that

a defendant has still one hour after the time set for trial. This is error; the provisions of the Civil Code in this respect does not apply to criminal cases. The theory that the government must always be ready, and the provisions of the constitution of most of the States, securing to the defendant a right to a speedy and public trial, must be construed according to the particular circumstances of each case. Were this not the case many who are guilty would escape punishment and the ends of justice would be defeated. We might cite an instance of a warrant being issued one day and the officer being unable to make service for several days thereafter on account of not being able to find the defendant, and that, probably for the reason of the defendant evading the process, and afterwards come into court and demand a trial immediately. It could not be expected that the prosecutor could detain his witnesses from day to day, awaiting the arrest of the defendant. Again, at the same time a warrant is issued the prosecutor usually calls for the subpoenas for the State, which are generally placed in the hands of an officer for service, and frequently the warrant is served and the prisoner brought into court before service has been made on the State witnesses. In such cases as these the State as well as the defendant is entitled to an extension of time. The same has been held by the Supreme Court of our own State in the case of *State v. Painter and Lindley*, in which the court held: "In a criminal action the State as well as the defendant is entitled to a reasonable time in which to procure the attendance of witnesses and prepare for trial." 40 Iowa, 298. All the pleas that are necessary are, first, guilty or not guilty, or a former adjudication; and this must be done before the commencement of the trial by an oral plea, which plea must be entered on the docket by the justice. Where a party appears without an information having been filed, or even in a case where one has been filed, and offers to plead guilty, the justice should enter the plea on his docket, but should not sentence the defendant in the absence of the prosecuting witness and without his consent, nor without evidence being introduced as to the circumstances in aggravation of the crime, so that he may be able to properly adjudge and pass sentence. Frequently it happens that where a party

commits a crime, and is in fear of prosecution, he will appear before the nearest justice, or before one whom he believes will assess but a small fine, and plead guilty; or, procures some friend to file an information against him, and in this manner attempts to shield himself and prevent the injured party from proceeding against him, and thus have but a small fine assessed, whereas, had the party injured prosecuted and introduced his evidence, showing the true state of facts, the punishment might be to the full extent of the law. Hence, prosecution brought about by the criminal himself, without the knowledge or consent of the injured party, is void and no bar to a future prosecution. In the case of *State v. Green and Mann*, it was held that "where the prosecution is brought about by the procurement of the defendants themselves and their conviction or acquittal were the result of fraud and collusion on their part, and the proceedings showed a fraudulent suppression of the chief criminal acts of the defendant, such proceedings are a nullity and the judgment of the justice of no force, and the State has its election either to appeal or commence a new prosecution." And if the latter course is pursued and the defendant pleads a former conviction the State then should reply by having an entry made on the docket of the justice to the effect that the prosecution on which such former adjudication was based was brought about by the defendant himself, and is therefore void. As to the State treating said prosecution as a nullity, see *State v. Green and Mann*, 16 Iowa, 239; 1 Bishop's Cr. Law, Sec. 679; *State v. Brown*, 12 Conn., 54; *Cone v. Jackson*, 2 Va., 10, 501; *State v. Little*, 1 N. H., 257, 258; *State v. Lowrie*, 1 Swan., 74; *State v. Corbin*, 11 Humph., 599. As to continuances the same laws applicable to cases in the District Court are applicable to justice's courts, and for the law, form of motion, and affidavit, and authorities in relation thereto, see title "Continuances." Continuances should be allowed to the State as well as to the defendant.

CHANGE OF VENUE.

If the defendant asks for a change of venue, the motion and affidavit therefor may be in the following form:



STATE OF IOWA, } In Justice's Court, before W. G. W township,
vs. . . . county, Iowa.
A . . . B . . . } *Motion for Change of Venue.*

Now comes the defendant and asks this court to grant him a change of venue in the above entitled cause to the next nearest justice to whom no objection exists, And in support of this motion files the following affidavit.

L. M . . . , *Attorney for A B.*

STATE OF IOWA, } ss.
. . County, }

I, A B, being duly sworn, upon oath do say, that I am the defendant in the above entitled cause, and W. G. W., the justice before whom this cause is pending, is prejudiced against me (or, the said justice is of near relation to the prosecutor herein, to-wit: N. L., or the party on whom the offense is committed; or, that the said justice is a material witness for the State or the defendant, as the case may be; or, that I cannot obtain justice before him, as this affiant verily believes).

A B . . .

Subscribed and sworn to, before me, this . . . day of . . . , 187 .
S. P. . . . , J. P.

The affidavit may be sworn to before a justice of the peace, notary public, or any other officer qualified to administer oaths.

For three causes, if made to appear to the justice under section 4671, Code of 1873, if the next nearest justice be a party to the action; or, second, where he is related to either party by consanguinity; or, third, where he has been attorney for either party in the action, the case should be sent to the next nearest justice against whom no such objection exists. If such objections, or any of them, exist within the knowledge of the justice, he should not, in that case, send the cause to such justice, but to the next nearest magistrate. Or, if the party applying for the change sets out in his affidavit in addition to what is set out in the foregoing form, any of the three causes last named in this form, as follows: And this affiant further states, that S. F., the next nearest justice in this township (or some other township), is a party to the above entitled action (or, is related to the prosecuting witness herein by consanguinity within the fourth degree, to-wit: a brother; or, that the said S. F. has been attorney for the prosecuting witness herein), he should likewise send the cause to the next nearest justice against whom no such objection exists.

The reasons for setting out the cause or causes last named is no doubt for the reason that but one change of venue is granted, and whatever causes exist must then be set out; and, the objections made against the first justice cannot be set out against the second. In these matters of changes of venue

where the proper cause is set out and the law fully complied with, the change must be allowed. The justice has no discretion, nor has he any authority to investigate as to the truth of the cause set out in the affidavit. The State is not entitled to a change from the justice before whom the proceedings were commenced, as the language of section 4669, Code of 1873, is essentially different from section 3533, Civil Code of 1873, which reads, "either party may have a change," while in section 4669 it reads, "unless a change of venue be applied for by the *defendant*." There being no provisions for a change of venue on the part of the State, it is, therefore, conceded that no change can be allowed. But where, in any case, any of the objections herein named exist within the knowledge of the justice, he should, on his own motion, transmit the cause to one against whom no objections exist. The object in view should be to give a fair and impartial trial to both parties.

JURY TRIAL.

The State cannot call a jury. Such right is only extended to the defendant.

When the defendant calls for a jury, and this he must do before the commencement of the trial, and by this is meant before evidence is introduced, the justice directs any peace officer to make out a list of names of eighteen inhabitants; this order need not be in writing but a simple verbal order. The persons thus put on the list and summoned need not necessarily be residents of the township but anywhere in the county. After six names have been stricken from the list as made out by the officer, the prosecutor then strikes one from the list, then the defendant, and so on until six are stricken out, leaving twelve to be impaneled.

The justice will then issue his venire, which may be in the following form:

Venire.

STATE OF IOWA, }
 County, } ss.

To any peace officer of the county:

You are hereby commanded to forthwith summon (here insert the twelve names) to be and appear before me, at my office, in M, said county, forthwith, or at 9 o'clock A. M., on the . . . day of . . . , 18 . . . , to sit as jurors in a case now pending before me, wherein the State of Iowa is plaintiff and A B is defendant, on a charge of larceny, and the said jurors will not fail to appear before me under penalty of the law, and you, the said officer, after having made service thereof, make due return to

me at my office forthwith, or on or before the . . . day of . . . , 18 . . . , at 9 o'clock A. M.

Dated this . . . day of . . . , 18 . . . L . . . N . . . Justice of the Peace. .

CHALLENGES.

There are only two kinds of challenges in justices' courts, viz: for cause and peremptory, as by Sec. 4678, Code of 1873; no challenge to the panel is allowed. Upon the appearance of the twelve jurors in obedience to the venire it is provided by Sec. 4678 that "the same challenges may be taken by either party to any individual juror, as on the trial of an indictment for a misdemeanor, where it is provided by Sec. 4413, title, "Challenging the Jury," Code of 1873, "and if a misdemeanor the State to three and the defendant to six challenges." From these provisions it clearly appears that in justices' courts, as well as in District Court, the State is entitled to three challenges and the defendant to six, leaving the number of three if all the challenges are exhausted. First the State challenges one, then the defendant challenges two, then the State one, and so on alternately until all the challenges have been exhausted or waived. Immediately upon the challenging of a juror his place shall be supplied by some one of the twelve not previously challenged. But if, by reason of the parties exhausting all of their challenges, the original twelve should not be sufficient, the justice may summon talesmen from the bystanders, if any are present, and if not by issuing a venire for their appearance. As many such venires as are necessary to complete the panel may be issued. And it will be seen that should the entire nine challenges be made it would be necessary to supply three such talesmen. When a juror is thus summoned he is bound to obey the venire; and he is not, as is sometimes erroneously supposed, entitled to his fees in advance, and, it has happened within our knowledge, that jurors have demanded their fees before delivering their verdict to the court. This they have no right to do, and in case they refuse to obey the venire or deliver their verdict, they are in contempt of court and may be punished.

Form of Verdict.

STATE OF IOWA, }
vs. } In Justice's Court, before W. G. W. . . . township.
A . . . B . . . }

We, the jury, find the defendant guilty as charged in the information (or not guilty). J . . . B . . . , Foreman. .

Form of Certificate of Conviction.

STATE OF IOWA, } Before W. G. W., a justice of the peace for . . . township,
 vs. } . . . county, Iowa.

A : . . . B : . . . }
 I do hereby certify that the defendant was convicted before me on the . . . day
 of . . . , on a charge of . . . , and by me fined in the sum of . . . dollars,
 which was paid by the defendant at the time to me.

Signed this . . . day of . . . , 18 . . .

W. G. W. . . . J. P.

Section 4692 provides that the above certificate should be made out but does not clearly define to whom it shall be delivered. The intention is to deliver it to the county auditor the same as the following receipt:

Form of Receipt as Provided in Sec. 4696.

STATE OF IOWA, } In justice's court, before W. G. W., . . . township, . . .
 vs. } county, Iowa,

A : . . . B : . . . }
 I hereby certify that I have this day received of A B, defendant herein, the sum
 of . . . dollars, being the full amount of the fine and costs assessed against him
 in the above entitled cause.

Signed this . . . day of . . . , 18 . . .

W. G. W. . . . J. P.

TRIAL—PRESENCE OF DEFENDANT.

Under section 4328, title, "Arraignment of the Defendant," and section 4351, title, "Mode of Trial," if he appear by counsel: If the defendant is indicted for a felony, he must be present; but, if tried for a misdemeanor, he can be tried without his presence. This applies to the practice in the District Courts, but the same rule of law would apply before a justice after a defendant, having been once arrested and brought before a justice, and after that refuses to further appear, if arrested for a misdemeanor of which the justice has jurisdiction to try, he may proceed to trial without the presence of the defendant, if he appear by counsel.

For a mere misdemeanor a defendant may be tried in his absence. *City of Bloomington v. Heiland*, 67 Ill., 278; 1 Am. Cr. R., Hawley, 600.

JURY—NUMBER—CONSTITUTIONAL LAW.

The Legislature may authorize trials by jury of less number than twelve in inferior courts. *Bryan v. State*, 4 Iowa, 352; *State v. Bencke*, 9 Ib., 204.

OFFENSES—INFERIOR GRADES IN INFERIOR COURTS.

The Legislature may pass laws making offenses of inferior grades originally cognizable by inferior courts. *Bryan v. State*, 4 Iowa, 352.

INFORMATIONS GENERALLY, SUFFICIENCY OF.

To allege in the information Vinton county instead of Benton county is deemed a clerical error and does not invalidate the information. *Devine v. State*, 4 Iowa, 444.

SIGNING IN BODY OF INFORMATION.

It is not necessary in an information to sign the same in the body thereof if the affidavit to the information is signed. It being considered a part of the information it is considered sufficiently signed, within the contemplation of the law. *Devine v. State*, 4 Iowa, 444.

LARCENY—FELONIOUS.

In an information for larceny it is not necessary to allege the word felonious. *State v. Stipult*, 17 Iowa, 575. But a description of the property, as near as may be, should be given, together with its value. *Merwin v. People*, 26 Mich., 298; 12 Am. Rep., 314.

INSUFFICIENCY OF.

To charge "did then and there, willfully and maliciously strike and beat said C. D. with intent of doing, etc.," charge an indictable offense, and one which the justice cannot try. Nor will an appeal from a judgment of conviction, in such a case, convey jurisdiction to the district court. *State v. Carpenter*, 23 Iowa, 506.

STATUTORY LANGUAGE.

The language of the statute need not be literally pursued in framing an information or indictment. *State v. Carpenter*, first line on page 508, 23 Iowa.

CLERICAL ERRORS DISREGARDED.

An information not being signed by the justice may be corrected by his signing his name officially to the jurat, if the information was in fact sworn to before him. *State v. Cuddy*, 40 Iowa, 419; *State v. Ensley et al.*, 10 Ib., 149.

AMENDING.

Where the signature of the prosecuting witness is inadvertently omitted, it may be attached on appeal in the District Court, the fact that it was sworn to being made to appear. Informations stand upon different ground from indictments,

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and are amendable. Bishop's Cr. Proceed., Vol. 1., Sec. 611; *State v. Merchant*, 38 Iowa, 375.

LOST INFORMATION, SUBSTITUTION FOR.

Where the original complaint in a case of misdemeanor appealed to the District Court be lost, the court may order a new complaint to be substituted, covering the same offense as shown by the justices' transcript, which is based on section 825, Criminal Code of Nebraska, which provides that "the District Court shall hear and determine any cause under this act, brought by appeal from a magistrate upon the original complaint unless such complaint shall be found insufficient or defective, in which event the court, at any stage of the proceedings, shall order a new complaint to be filed therein, and the case shall proceed thereon the same in all respects as if the original complaint had not been set aside." *Bays v. State*, 6 Neb. R., 167; the same may be claimed under the Iowa Code of 1873, Sec. 4702. See "Proceedings and Trials before Justices of the Peace."

SUFFICIENCY—SPECIFIC IN ITS CHARGES.

While technical errors are not recognized in justices' courts, yet informations should be so specific that the defendant is properly advised of the charges brought against him. And if convicted or acquitted he may plead such conviction or acquittal in bar of any further prosecution. *State v. Bitman*, 13 Iowa, 485; *Merwin v. People*, 26 Mich., 298; 12 Am. Rep., 314.

VARIANCE BETWEEN PROOF AND ALLEGATIONS.

See "Indictment."

CHANGE OF VENUE.

Under the Code of 1851 more than one change of venue was allowed for causes existing but not known to defendant at the time of making his first application. *State v. Ninski*, 7 Iowa, 337.

POWER OF JUSTICE TO APPOINT AN ATTORNEY.

A justice of the peace has no authority to appoint, on behalf of the State, an attorney to conduct a criminal prosecu-

tion commenced before him. *Davis v. Linn County*, 24 Iowa, 508.

APPEAL, NOTICE OF.

Under the laws of 1857, in case where the defendant appealed, it was necessary for him to serve a notice on the district attorney ten days previous to the commencement of the District Court. *State v. Moran*, 8 Iowa, 399. This, however, is changed by section 4697, Code of 1873, which says that "if the defendant desires to appeal, he must at the time of the rendition of the verdict, give to the justice notice orally that he appeals," and then perfect his appeal bond as provided in section 4698. The civil code giving a party twenty days to appeal does not apply to criminal cases, as the appeal must be perfected without delay.

BOND CONDITIONAL.

The condition of an appeal bond, in a criminal action, should be, that the defendant will appear, will not depart from the court without leave, and will abide the judgment. A bond conditioned that the defendant will pay whatever amount may be adjudged against him cannot be required. *State v. Beneke*, 9 Iowa, 204.

TRIAL IN DISTRICT COURT ON APPEAL FROM JUSTICES.

The defendant cannot, on the trial of a criminal action, in the District Court on appeal from the judgment of a justice, be tried and convicted on counts in the information which were withdrawn in the trial below. *State v. Shilling*, 10 Iowa, 106.

WITHDRAWAL OF PLEA PERMITTED.

The defendant has the right to withdraw his plea of "guilty" and substitute a plea of "not guilty." *State v. Craft*, 10 Iowa, 330.

APPEAL—WAIVER OF ERRORS.

An appeal from the judgment of a justice of the peace in a criminal action, is a waiver of all irregularities in the court below, and the cause must be tried upon its merits. *State v. McCombs*, 13 Iowa, 426.

PLEA—RECORD—PRESUMPTION.

Where the record shows that in the trial before the justice the defendant was present and demanded a jury, a plea of not guilty is presumed. *State v. McCombs*, 13 Iowa, 426.

JURISDICTION OF DISTRICT COURT, HOW ACQUIRED.

The District Court can acquire no appellate jurisdiction by the mere filing of an appeal bond. The appeal can be perfected only by giving notice orally as required by section 4697, Code of 1873, which is the same in substance as section 5095, Rev. 1860. *State v. Leyden*, 13 Iowa, 434.

APPEAL BY STATE.

Under section 5094, Revision of 1860, the cases of *State v. Tait & Tait*, 22 Iowa, 142, and *State v. Van Horton*, 26 Iowa, 402, decided that the State, as well as the defendant, might appeal; and in the former case the court held that the State had the right to appeal from the judgment of a justice, whether the judgment was in favor of the State or against it. This view, however, was not supported in the latter case, as the court there held that the State had a right to appeal, but so as not to affect a defendant's rights after trial and acquittal. This section of the Revision referred to and upon which these two cases are based, has been entirely omitted in the Code of 1873. It may now be considered as well settled that the State cannot appeal for the purpose of having a new trial on the merits, but only for the purpose of settling questions of law. The same is held in cases of appeals from District to Supreme Courts. *State v. Painter & Lindley*, 40 Iowa, 298.

FROM JUSTICE'S JUDGMENT—TAXING COSTS AGAINST PROSECUTING WITNESS.

With the right to appeal from the judgment of the justice, taxing the costs to the prosecuting witness exists; and it is the only mode by which such a question can be tried. *State v. Roney*, 37 Iowa, 30.

WAIVER OF, BY PAYMENT OF FINE.

By the voluntary payment of a fine the defendant waives his right to appeal from the judgment. *State v. Westfall and Mathews*, 37 Iowa, 575.

JUSTICE'S JURISDICTION, WAIVER OF.

An objection to the jurisdiction of a justice, will be presumed to have been waived unless made upon the trial before him. It cannot first be raised upon an appeal to the District Court. *State v. Kinney*, 41 Iowa, 424.

JUSTICE'S JURISDICTION—FUGITIVES FROM JUSTICE.

A justice has no jurisdiction to take recognizance of a prisoner convicted of a felony, and who escapes before sentence into another State, on his being brought back for sentence. *Com. v. Otis*, 16 Mass., 198.

SUNDAY—RECEIVING VERDICT.

A justice may receive the verdict of a jury on Sunday, but he cannot enter judgment on it on that day. *Lorring v. Halling*, 15 Johnson, 119; *Allen v. Godfrey*, 44 N. Y., 433; *Pulling v. People*, 8 Barb., 384.

NO JURISDICTION TO SET ASIDE A VERDICT.

A justice has no jurisdiction to set aside a verdict. *Dupont v. Downing*, 6 Iowa, 174.

TRIAL BY JURY WHEN DEMANDED.

When a jury is demanded by the defendant, the justice cannot try the case himself. *Dupont v. Downing*, 6 Iowa, 174.

READING INFORMATION TO DEFENDANT, WAIVER OF.

The failure on the appearance of the defendant before the court to read to him the information is waived by appeal. *State v. McCombs*, 13 Iowa, 426.

For Contempts, and punishments thereof, see title "Contempts."

For Jurisdiction in Liquor Cases and Intoxication, see "Prohibitory Liquor Law."

WRIT OF ERROR.

For writ of error in criminal cases to justices, see title "Writ of Error."

PRELIMINARY EXAMINATIONS.

SECTION, 4226. When the defendant is brought before the magistrate on arrest, either with or without a warrant, the magistrate must immediately inform him of the offense with which he is charged, and of his right to the aid of counsel in every stage of the proceedings.

SEC. 4227. The magistrate must allow the defendant a reasonable time to send for counsel, and, if necessary, must adjourn the examination for that purpose.

SEC. 4228. The magistrate, immediately after the appearance of counsel, or, if the defendant require the aid of counsel, after waiting a reasonable time therefor, must proceed to examine the case; *provided*, however, that before said examination is commenced, said defendant may have a change of venue upon filing an affidavit that the magistrate is prejudiced against him, is a material witness for either party, or that the defendant cannot obtain justice before him, as affiant verily believes. On filing of such affidavit a change of venue must be allowed, and the magistrate must immediately transmit all original papers, and a transcript of the record entire in the case, to the next nearest magistrate in the township against whom no objection exists, if there be any; if not, to the next nearest magistrate in the county against whom no such objections in the opinion of the justice exists, who shall proceed with said examination as hereinafter provided. Only one such change of venue shall be allowed.

SEC. 4229. The examination must be terminated at one session unless the magistrate, for good cause shown, adjourn it.

SEC. 4230. No examination can be adjourned for a longer period than thirty days.

SEC. 4231. If an adjournment be had for any cause, the magistrate shall commit the defendant for examination, or require him to give ample security for his appearance at the time and place to which the examination is adjourned.

SEC. 4232. If there is no jail in the county, the sheriff must retain the defendant in his custody until the examination.

SEC. 4233. The magistrate must issue subpoenas for any witnesses required either by the state or by the defendant, and the witnesses who appear at the examination must be examined in the presence of the defendant.

SEC. 4234. The deposition of a witness who resides out of the county in which the examination is had, may be taken, on application of the defendant on the order of the magistrate, before any officer authorized to take depositions in civil cases; which order shall not be made until three days after the filing with the magistrate of the written interrogatories to be pro-

pounded to the witness; nor until three days after the service of notice on the state, or on the attorney who appears for the state, of the filing of such interrogatories.

SEC. 4235. Before the order to take the deposition is made, the state may file cross-interrogatories to be propounded to the witness, which shall be answered by him in the deposition.

SEC. 4236. At the expiration of three days from the filing of the interrogatories, and the service of the notice thereof on the state as above provided, the magistrate may order the testimony of the witness to be taken in answer to the interrogatories and cross-interrogatories, if any, on file; and the deposition thus taken may be read as evidence on the examination; nor shall the same be excluded because of any irregularity in the taking of it, if the magistrate is satisfied that the irregularity complained of could work no substantial prejudice to the opposite party.

SEC. 4237. The defendant shall be a competent witness in his own behalf, but he cannot be called to give testimony against himself; nor shall his failure to become a witness be allowed any weight against him on the examination.

SEC. 4238. When the defendant testifies in his own behalf, he shall be subject to a cross-examination as an ordinary witness; *provided*, that, in the cross-examination, the state shall be strictly confined to the matters testified to in the examination-in-chief.

TRIAL.

SECTION 4239. While a witness is under examination before the magistrate, he may exclude all others who have not been examined. He may also cause the witnesses to be kept separate, that they may not converse with each other until they are all examined.

SEC. 4240. The magistrate must also, upon the request of the defendant, exclude from hearing the examination all persons except the magistrate, his clerk, the peace officer who has the custody of the defendant, the attorney or attorneys representing the state, and the defendant and his counsel.

SEC. 4241. The magistrate shall, in the minutes of the examination, write out or cause to be written out, the substance of the testimony given on the examination by each witness examined before him, showing the name of the witness, his place of residence, and his business or profession, and the amount to which each witness is entitled for mileage and attendance.

SEC. 4242. After the examination is closed, the magistrate must attach together the complaint, the warrant or order of commitment, if any, under which the defendant was brought

before him, the minutes of the examination, including all depositions on file with him and used in the examination, and annex thereto his certificate, which must set forth in substance the time and place of examination, and that the minutes thereof are true, and the certificate must be signed by the magistrate, with his name of office.

SEC. 4243. If, after hearing the testimony, it appear to the magistrate, either that a public offense has not been committed, or that there is no sufficient reason for believing the defendant guilty thereof, he must order the defendant to be discharged; and such order must be indorsed on the minutes of the examination or annexed thereto and signed by the magistrate, to the following effect: "There being no sufficient cause for believing the defendant guilty of the offense herein mentioned, or of any other offense, I order him to be discharged."

SEC. 4244. If it appears from the examination that a public offense triable on indictment has been committed, and that there is sufficient reason for believing the defendant guilty thereof, the magistrate shall in like manner indorse on or annex to the minutes of the examination, an order signed by him to the following effect: "It appearing to me by the within minutes that the offense therein mentioned, or any other offense triable on indictment, according to the fact, stating generally the nature thereof, has been committed, and there is sufficient cause for believing the defendant guilty thereof, I order that he be held to answer the same."

BAIL.

SEC. 4245. If bail be taken by the magistrate, the following words in substance must be added to the order mentioned in the preceding section, "and I have admitted him to bail to answer thereto by the undertaking hereto annexed,"—and the undertaking of bail must be annexed thereto.

SEC. 4246. If bail be not given by the defendant, then the magistrate must add to the order mentioned in section forty-two hundred and forty-four the following words in substance: "and that he be admitted to bail in the sum of (here state the amount), and that he be committed to the jail of the county of (here name the county), until he give such bail."

SEC. 4247. If the magistrate order the defendant to be committed, he shall make out a warrant of commitment, signed by him with his name of office, and deliver it with the defendant to the officer to whom he is committed, or, if the officer be not present, to a peace officer who shall deliver the defendant into the proper custody, together with the warrant of commitment, which warrant may be in form following:

"THE STATE OF IOWA,

To the sheriff of county:

An order having been this day made by me that A. . B. . (the name of the defendant), be held to answer upon a charge of (state the offense) you are commanded to receive him into your custody and detain him in the jail of the county until he be legally discharged.

Dated at....., this.....day of....., A. D....

SEC. 4248. On holding the defendant to answer, the magistrate must take from each material witness examined by him on the part of the state, a written undertaking, to the effect that he will appear and testify at the court to which the defendant is bound to answer, or that he will forfeit the sum of one hundred dollars.

SEC. 4249. Whenever the magistrate is satisfied by oath, or otherwise, that there is reason to believe that any such witness will not fulfill his undertaking and appear and testify unless surety be required, he may order the witness to enter into a written undertaking with sureties, and in such sum as he may deem proper for his appearance.

SEC. 4250. Minors and married women who are material witnesses against the defendant, may, in like manner, be required to procure sureties for their appearance as provided in the preceding section.

SEC. 4251. If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuse compliance with the order for that purpose, the magistrate must commit him until he comply or be legally discharged.

SEC. 4252. When a magistrate has discharged a defendant, or held him to answer an indictment, he must return to the district court of the county, on or before its opening, on the first day of the next term thereof, and as soon after the closing of the examination as practicable, all the papers mentioned in section four thousand two hundred and forty-two of this chapter, together with the undertaking of bail for the appearance of the defendant, and the undertakings of the witnesses, or for them, taken by him.

SEC. 4253. If it appear from the examination that a public offense has been committed which is not triable on indictment, but on information only, and that there is sufficient reason for believing the defendant guilty thereof, the magistrate shall retain all the papers, and forthwith order an information to be filed against the defendant before him. If he have not jurisdiction to try and determine the same, he shall indorse on, or annex to, the minutes of the examination an order, signed by him to the following effect: "It appearing to me

by the within minutes that the offense of (here state its name, or nature generally) has been committed, and that there is sufficient reason for believing the defendant guilty thereof, I order that an information be filed against him therefor before (here name some magistrate who is the nearest and most accessible in the same county, and who has jurisdiction, giving the name of office,) and that the defendant be committed to any peace officer to be taken before such magistrate." And the magistrate shall thereupon cause each material witness on the part of the state to enter into a written undertaking, to the effect that he will appear forthwith before the magistrate before whom the defendant is to be taken, or that he will forfeit the sum of fifty dollars, and deliver the undertaking, with all the other papers, to a peace officer, who shall forthwith proceed as directed by the order, and take the defendant before such magistrate, and deliver all the papers, with the undertakings of the witnesses, to the magistrate directed in the order, and make his return thereto, and sign the same with his name of office, and the magistrate before whom he is taken shall thereupon proceed accordingly.

SEC. 4254. When the defendant is discharged the justice shall, if he is satisfied that the prosecution is malicious or without probable cause, tax the costs against the complainant and render judgment therefor; but the person against whom such judgment is rendered may appeal in the same manner, and with the same effect, as is provided for a prosecuting witness in section four thousand six hundred and eighty-nine of this code.

LAWS OF 1874, CHAPTER 30, PAGE 22.

SECTION 1. That section 4254, chapter 12, title 25 of the Code of 1873, be amended by striking out of line seven (7), of said section the words "eighty-nine," and inserting in lieu thereof the words "ninety-one," and by adding "otherwise the costs shall be taxed against the state," to said section.

The form of preliminary information may be as follows:

Preliminary Information.

STATE OF IOWA,	}	Before A . . G . . , an examining magistrate of . . county,
Vs.		Iowa.
A . . . B . . . }		<i>Preliminary information.</i>

The defendant is accused of the crime of grand larceny: For, that the defendant, on the 23d day of July, 1877 (or, on or about), in the township of Marion, Linn county, Iowa, did, unlawfully and feloniously take, steal and carry away, one bay horse, four years old, of the value of one hundred dollars, and the property of C D, contrary to, and in violation of, law.

Subscribed and sworn to before me, this 23d day of July, 1877.

A . . . G . . . , J. P.

An information may be signed by any one knowing the facts or having reason to believe that they are true.

A change of venue is allowed for three causes (see, section 4228 herein), the form of which may be substantially as follows:

Form of Application for Change of Venue.

STATE OF IOWA, } Before A . . G, an examining magistrate of Linn county,
vs. } Iowa.
A . . . B . . . } *Application for change of venue.*

Now comes the defendant and asks this court to grant him a change of venue in the above entitled preliminary proceedings, as by law provided; and in support of this motion files the following affidavit:

STATE OF IOWA, } ss.
. . . COUNTY, }
A . . . B . . . ,
Or, M . . . L . . . , Att'y for, Def't.

I, A B . . , being duly sworn upon oath, do say that I am the defendant in the above entitled proceeding, and that the magistrate, A G, before whom this case is pending, is prejudiced against me (*or, is a material witness for the prosecution herein; or, that I cannot obtain justice before said magistrate*), as affiant verily believes.

Subscribed and sworn to before me this 25th day of July, A. D. 1877.
A . . . G . . . , *J. P.*

When such affidavit is filed, the magistrate has no discretion in the matter, nor can he investigate or inquire into the matter as to whether the statements or causes set forth for said change are true or not, but must allow the change. Nor is a jury allowed to a defendant on a preliminary examination. Only one change of venue shall be allowed.

The form of undertaking of witnesses for their appearance at the District Court, under section 4248, may be as follows:

STATE OF IOWA, }
vs. } Undertaking of . . . , a witness on behalf of the State.
C . . . D . . . }

I, . . . , do hereby undertake and bind myself unto the State of Iowa in the sum of fifty dollars, upon conditions as follows: Whereas, the said C D, was by an order of A G, an examining magistrate of Marion township, Linn Co., Iowa, bound over and held for his appearance at the District Court of said Linn county, on a charge of grand larceny; and whereas, I, the undersigned, was a material witness on behalf of the State, and by order of said magistrate required to enter into an undertaking for my appearance at the said District Court: Now, if I, the said . . . , shall appear at the next term of the District Court in pursuance of the order of said magistrate, and abide the orders of said District Court, then this undertaking to be void, otherwise in full force.

The above undertaking is, by me this day, accepted and approved.
July 23, 1877.

A . . . G . . . ,
Examining Magistrate.

Or, in case where the magistrate has reason to believe that a witness will not fulfill his undertaking, and makes an order

as in section 4249, provided the form as given will answer, by commencing;

We, the undersigned . . . , principal, and . . . , as surety, are held and firmly bound unto the State of Iowa in the sum of fifty dollars, upon condition as follows; Whereas, etc.

MINUTES OF MAGISTRATE AS EVIDENCE ON TRIAL IN COURT.

The minutes of the testimony taken by a magistrate, at a preliminary examination, and introduced by defendant on trial in the District Court without objection, is not conclusive upon the State. *State v. Hull*, 26 Iowa, 293; *State v. Collins*, 32 Ib., 36.

MINUTES OF MAGISTRATE INADMISSIBLE AS EVIDENCE ON TRIAL.

The minutes of the testimony of witnesses, taken down by a magistrate in a preliminary examination before him, are not admissible against a defendant on trial. *State v. Collins*, 32 Iowa, 36.

DEFENDANT HAS NO ABSOLUTE RIGHT TO COUNSEL.

In preliminary examinations, the defendant has no absolute right to presence of counsel, or to publicity in these examinations unless given by statute. *Rex v. Ellis*, Ry. & Mood, 432; *Cox v. Coleridge*, 1 Barnwell & Cresswell, K. B., 37. The right to the aid of counsel is given by Sec. 4226, Iowa Code of 1873.

BAR—JEOPARDY.

One preliminary examination for a criminal offense is no bar to another preliminary examination for the same offense. Nor is it any bar to a prosecution for such offense, although the defendant may have been discharged on the first preliminary examination. A mere preliminary examination does not put the accused in jeopardy, within the meaning of Sec. 10, "Bill of Rights," Constitution of Kansas. *State v. Jones*, 16 Kan., 608; *Morrissey v. People*, 11 Mich., 334. A dismissal by a magistrate is not equivalent to an acquittal by a jury. 12 Cox's Crim. Cases, 390; 1 Green's Crim. R., 94.

While Sec. 12, Article 1, Bill of Rights, Constitution of Iowa, reads, "No person shall, after acquittal, be tried for the same offense," this does not apply to preliminary examinations; so that one preliminary examination would be no bar

to another preliminary examination for the same offense, in this State, as it is only an examination and not a trial.

INFORMATION SWORN TO, EFFECT OF.

The requirement of having the information sworn to is not for the purpose of evidence, which is to be weighed and passed upon, but only to secure good faith in the institution of the proceedings, and to guard against groundless and vindictive prosecutions. *Washburn v. People*, 10 Mich, 372.

WITNESS DEFENDANT IN HIS OWN BEHALF.

While some statutes, as now under the Iowa laws of 1878, give the defendant the right to be a witness in his own behalf, on his declining to exercise such right, the prosecutor is prohibited, in his argument, or at any stage of the proceedings, from referring to the defendant's so declining. *People v. Tyler*, 8 Am. Law Register, 430

PROCESS UPON AN INDICTMENT.

SECTION 4318. The process upon an indictment for the arrest of an individual, shall be a bench warrant.

SEC. 4319. When an indictment is filed by the clerk of the court against a defendant, not in custody, or under bail, or who has not deposited money instead of bail, the judge of the court shall make an order on the indictment, which shall be signed by him, with his name of office that a bench warrant issued for the arrest of the defendant, and, if the offense charged in the indictment be bailable, fix the amount in which bail may be taken.

SEC. 4320. The clerk, on the application of the district attorney, shall accordingly, at any time after the making of the order of the judge, whether the court be in session or not, issue a bench warrant into one or more counties.

SEC. 4321. A bench warrant, if the offense be a felony, may be, substantially, in the following form.

County of.....

The State of Iowa.

To any peace officer in the State:

An indictment having been found in the district court of said county, on the....day of, A. D., 18...., (the day on which the indictment is marked filed, by the clerk of the court), charging A B with the crime of (here designate the offense by name, if it have one, or by a brief general description of it, as given by law, substantially, as in the indictment).

You are, therefore, hereby commanded to arrest the said A B, and bring him before said court to answer said indictment, if the said court be then in session in said county, or if the said court be not then in session in said county, that you deliver him into the custody of the sheriff of said county.

Given under my hand, and the seal of said court, at my [SEAL] office in, in the county aforesaid, this . . . day of, A D., 18

By order of the judge of the court.

., Clerk.

SEC. 4322. If the offense be a misdemeanor, the bench warrant may be in a similar form, adding to the body thereof a direction, substantially to the following effect:

"Or, if the said A. B. require it, that you take him before a magistrate, or the clerk of the district court in said county, or in the county in which you arrest him, that he may give bail to answer the said indictment."

SEC. 4323. If the offense charged be bailable, the clerk must make an indorsement on the bench warrant to the following effect: "The defendant is to be admitted to bail in the sum of dollars." (The amount fixed by the judge and indorsed on the indictment.)

SEC. 4324. The bench warrant may be served in any county in the state.

SEC. 4325. If the defendant, when arrested, be brought before a magistrate, or the clerk of the district court of the same county in which it was issued, or another county, for the purpose of giving bail, the same proceedings must be had, in all respects, as if he had been arrested on a warrant of arrest, issued by a magistrate on a preliminary information, as nearly as may be.

SEC. 4326. The process upon an indictment against a corporation shall be a notice; which shall be issued by the clerk at any time after the filing of the indictment in his office, on the application of the district attorney. The notice shall be under the seal of the court, and shall, substantially, notify the defendant of the finding of the indictment, of the nature of the offense charged, and that he must forthwith appear and answer the same. It may be served by any peace officer in any county in the state on any officer or agent of the defendant, by reading the same to him and leaving with him a copy thereof. It shall be returned to the clerk's office without delay, with proper evidence of its service; and, from and after two days from the time of making such service, the defendant shall be considered in court, and thereafter shall be considered to be present to all proceedings had on the indictment.

REASONABLE DOUBT.

If, upon all the evidence, there is a reasonable doubt, the defendant is entitled to the benefit. *Tweedy v. State*, 5 Iowa, 334. But a doubt which authorizes an acquittal should be actual, substantial, rational and conscientious, and not artificial and forced. *State v. Bodeken*, 34 Iowa, 521; *State v. Ostrander*, 18 Ib., 458; *Dr. Webster's Case*, 5 Cushing, 320; *State v. Nash and Redout*, 7 Iowa, 347, 385. It is not a reasonable doubt of any one proposition of fact in the case which entitles a defendant to an acquittal, but it is a reasonable doubt of guilt based upon a consideration of all the evidence in the case. *State v. Hayden*, 45 Iowa, 11.

RECOMMITMENT OF DEFENDANT AFTER GIVING BAIL, OR DEPOSITING MONEY.

SECTION 4601. The district court in which a criminal action is pending, or during the pendency of an appeal from its judgment in such action, or in which a judgment is to be carried into effect, may, by an order entered on the record, direct the defendant to be arrested and committed to jail until legally discharged, after he has given bail, or deposited money instead thereof, in the following cases:

1. When by reason of his failure to appear, he has incurred a forfeiture of his bail, or money deposited instead thereof;

2. When it satisfactorily appears to the court that his bail, either by reason of the death of one or more of them, or from any other cause, is insufficient, or have removed from the state;

3. When upon the finding of an indictment, the court deems the bail taken by the committing magistrate insufficient.

SEC. 4602. The order for recommitment of the defendant must recite generally the facts upon which it is founded, and must direct that the defendant be arrested and committed to the custody of the sheriff of the county where the depositions and statement were returned, or the indictment was found, or the conviction was had, as the case may be had, to be detained until legally discharged.

SEC. 4603. The defendant may be arrested pursuant to the order upon a certified copy thereof, in any county in the state.

SEC. 4604. If the order recite as the ground on which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirements of the order.

SEC. 4605. If the order be made for any other cause and the offense be bailable, the court may fix the amount of bail, and may cause a direction to be inserted in the order that the defendant be admitted to bail in the sum fixed, which must be specified in the order.

REPEALS BY IMPLICATION.

The repeal of statutes by implication are not favored. *Casey v. Harned*, 5 Iowa, 1; *Robertson v. Young*, 10 Ib., 291; *Thatcher v. Haum*, 12 Ib., 303; *Baker v. Steamboat Milwaukee*, 14 Ib., 214; *Allen v. Pegram*, 16 Ib., 163; *Burke v. Jeffries*, 20 Ib., 145; *City of Dubuque v. Harrison*, 34 Ib., 163; *Morrison v. Hershire*, 32 Ib., 271; *Prisdon v. Shank*, 37 Ib., 82; *State v. Brandt*, 41 Ib., on page 614.

SUBSEQUENT STATUTES COVERING EARLIER STATUTES.

Where subsequent statutes cover the whole ground occupied by an earlier statute, it repeals by implication the former statute, though there be no repugnance. *Commonwealth v. Cooley*, 10 Pick., 37; *Goodnow v. Buttrick*, 7 Mass., 140; *Bartlett v. King*, 12 Mass., 537; *Ashly v. Appellant*, 4 Pick., 21, 23; 1 Ib., 452; 17 Ib., 80; 5 Ib., 168; 3 Cushing, 150; 3 Binney, 595, 597; 13 S. & R., 426; *State v. Whitworth*, 8 Porter, 434; *Smith v. State*, 1 Stew., 506; *State v. Seaborn*, 4 Dev., 305, 310; *Dugan v. Gittings*, 3 Gill, 138; *Smith v. State*, 14 Mo., 147; *Bryan v. Sundberry*, 5 Texas, 418; *Leighton v. Walker*, 9 N. H., 59; *Shannon v. People*, 5 Mich., on page 85.

SEARCH WARRANTS.

SECTION 4629. A search warrant is an order in writing, in the name of the state, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

SEC. 4630. It may be issued upon either of the following grounds:

1. When the property was stolen or embezzled, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be;
2. When it was used as the means of committing a felony;

in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or of any other person in whose possession it may be;

3. When it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to which he may have delivered it for the purpose of concealing it or preventing its being discovered; in which case it may be taken on the warrant from such person, from a house or other place occupied by him or under his control.

SEC. 4631. No search warrant can be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.

SEC. 4632. The magistrate must, before issuing a warrant, examine on oath the applicant therefor and any witnesses he may produce, and take their affidavits in writing, and cause each affidavit to be subscribed and sworn to before him by the person making it.

SEC. 4633. The affidavit must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

SEC. 4634. If the magistrate be thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he shall issue a search warrant, signed by him with his name of office, directed to any peace officer in the county, commanding him forthwith to search the person or place named for the property specified, and bring it before him.

SEC. 4635. The local jurisdiction of magistrates, in exercising the powers conferred on them by this chapter, is as defined in this code.

SEC. 4636. The warrant may be, substantially, in the following form:

County of.....

The state of Iowa:

To any peace officer of said county:

Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken) that (stating the particular grounds of the application according to section four thousand six hundred and thirty of this chapter; or, if the affidavit be not positive, that there is probable cause for believing that—(stating the ground of the application in the same manner); you are therefore commanded, in the day time (or at any time of the day or night, as the case may be, according to section four thousand six hundred and

thirty of this chapter) to make immediate search on the person of C. D., or, in the house situated (describing it or any other place to be searched, with reasonable particularity, as the case may be), for the following property (describing it with reasonable particularity); and if you find the same, or any part thereof, to bring it forthwith before me, at (stating the place).

Dated at, this day of, A. D. 18 . . .

E. F., justice of the peace.

(Or, as the case may be.)

SEC. 4637. A search-warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer, on his requisition, he being present and acting in its execution.

SEC. 4638. The officer may break open any outer or inner door or window of a house, or any part of the house, or anything therein to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

SEC. 4639. He may break open any outer or inner door or window of a house for the purpose of liberating a person, who, having entered to aid him in the execution of the warrant, is detained therein, or, when necessary, for his own liberation.

SEC. 4640. The magistrate must insert a direction in the warrant, that it be served in the day-time unless the affidavit be positive that the property is on the person, or in the place to be searched; in which case, he may insert a direction that it may be served at any time of the day or night.

SEC. 4641. A search warrant must be executed and returned to the magistrate by whom it was issued within ten days after its date. After the expiration of such time, the warrant, unless executed, is void.

SEC. 4642. When the officer takes any property under the warrant, he must give a receipt for the property taken, specifying it in detail, to the person from whom it was taken or in whose possession it was found, or, in the absence of the person, he must leave it in the place where he found the property.

SEC. 4643. The officer must forthwith return the warrant to the magistrate, and at the same time deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken and of the applicant for the warrant, if they be present. verified by the affidavit of the officer at the foot of the inventory and taken before the magistrate, to the following effect: "I, the officer by whom the annexed warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

SEC. 4644. The magistrate, if required, must deliver a copy

of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

SEC. 4645. If the grounds on which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto.

SEC. 4646. The testimony given by each witness must be reduced to writing and authenticated by the magistrate.

SEC. 4647. If it appear that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate shall cause it to be restored to the person from whom it was taken.

SEC. 4648. If the property taken by virtue of a search warrant was stolen or embezzled, it must be restored to the owner, upon his making satisfactory proof to the magistrate of his ownership thereof, or of his right of possession thereto, as provided in the next chapter. If it was taken on a warrant issued on the grounds stated in the second and third subdivisions of section four thousand six hundred and thirty of this chapter, the magistrate must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense which the property taken was used as a means of committing, or so intended to be, is triable.

SEC. 4649. The magistrate must annex together the affidavits taken before the issuing of the warrant, the warrant, the return, and the inventory, and return them to the next district court of the county, at or before its opening, on the first day of the next term thereof.

SEC. 4650. Whoever, maliciously and without probable cause, procures a search warrant to be issued and executed, is guilty of a misdemeanor.

SEC. 4651. A peace officer who, in executing a search warrant, willfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor.

SEC. 4652. When a person charged with a felony is snpposed by the magistrate before whom he is brought, to have upon his person a dangerous weapon or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order, or the order of the court in which the defendant may be tried.

SEC. 4653. When any officer, in the execution of a search warrant, shall find any stolen or embezzled property, or shall seize any other things for which a search is allowed by this chapter, all the property and things so seized shall be safely

kept by the direction of the court or magistrate, so long as shall be necessary for the purpose of being produced as evidence on any trial; and as soon as may be afterwards, all such stolen and embezzled property shall be restored to the owner thereof, and all other things seized by virtue of such warrant shall be destroyed under the direction of the court or magistrate.

The form of an information, or application, may be as follows, to-wit:

Application for a Search Warrant.

STATE OF IOWA, }
 . . . County, } ss.

I, A D, being duly sworn, upon oath do say, that certain personal property, to-wit: one of the value of \$, and the property of this deponent, was feloniously stolen from him (or from his dwelling), in township of , . . . county, Iowa, on or about the . . day of , 1876, and that this deponent suspects, and verily believes, that one E F has stolen and taken the same, or does feloniously and unlawfully conceal the same, knowing the same to be stolen; and that the same is concealed in the dwelling house of said , situated and being (here-describe the premises).

Wherefore, this deponent asks that a search warrant issue to search said dwelling house for said property.

SERVICE OF WARRANT.

The warrant shall be directed to some particular officer, such as the sheriff or constable, or marshal of , and served by such officer, to whom it is directed only. *People v. Holcomb*, 3 Park's Cr. R., 656.

DISPOSITION OF PREMISES.

The premises, where it is alleged that the property is concealed, should be clearly described in the warrant. *People v. Holcomb*, 3 Par's Cr. R., 656.

DESCRIPTION OF PROPERTY—NOTICE TO PARTY IN WHOSE POSSESSION IT WAS FOUND.

While there is no statutory provision, it is a better practice for the justice, when a search warrant is returned, with property, to cause a notice to be served on the party in whose possession it was found, for his appearance before said justice, at a certain time and place, that proper inquiry may be had as to the property taken with the warrant, in order to guard against the abuse and illegal taking of property with warrants.

SELECTING, DRAWING, SUMMONING AND IMPANELING THE GRAND JURY.

SECTION 227. All qualified electors of the State of good moral character, sound judgment, and in full possession of the senses of hearing and seeing, are competent jurors in their respective counties.

SEC. 228. The following persons are exempt from liability to act as jurors: All persons holding office under the laws of the United States or of this State; all practicing attorneys, physicians, and clergymen; all acting professors or teachers of any college, school, or other institution of learning; and all persons disabled by bodily infirmity, or over sixty-five years of age.

SEC. 229. Any person may also be excused from serving on a jury when his own interests or those of the public will be materially injured by his attendance, or when the state of his own health, or the death, or the sickness of a member of his family, requires his absence.

SEC. 231. The number of grand jurors shall be fifteen, and in counties containing less than fifteen thousand inhabitants as shown by the last preceding census, the trial jurors shall consist of the same number, unless the judge otherwise orders. But in counties containing a greater number of inhabitants, the number of trial jurors shall be twenty-four.

SEC. 234. Two jury lists, one consisting of seventy-five persons to serve as grand jurors, and one consisting of one hundred and fifty persons, or, in counties containing more than twenty thousand inhabitants, of two hundred and fifty persons, to serve as trial jurors, and composed of persons competent and liable to serve as jurors, shall annually be made in each county from which to select jurors for the year commencing on the first day of January.

SEC. 235. Should there be less than the required number of such persons in any county, the list shall comprise all those who answer the above description in the same proportion.

SEC. 236. On or before the first Monday in September in each year, the county auditor shall apportion the number to be selected from each election precinct, as nearly as practicable, in proportion to the number of votes polled therein at the last general election, and shall deliver a statement thereof to the sheriff.

SEC. 237. The sheriff shall cause a written notice to be delivered to one of the judges of election in each precinct, of the county, on or before the day of the general election in each year, informing them of the number of jurors apportioned for the ensuing year to their respective precincts.

SEC. 238. The judges shall thereupon make the requisite selection, and return lists of names selected to the auditor with the returns of the election, and in case the judges of election fail to make and return said lists, as herein required, the county canvassers shall at the meeting to canvass the votes polled in the county, make such lists for the delinquent precincts, and the auditor shall file such lists in his office and cause a copy thereof to be recorded in the election book.

SEC. 239. Grand jurors shall be selected for the first term in the year in which jurors are required, commencing next after the first day of January in each year, and shall serve for one year. Trial jurors shall be selected for each term wherein they are required; but no person shall be required to attend as a trial juror more than two terms in the same year, and in counties containing a population of more than five thousand inhabitants, it shall be a cause of challenge that the person has served on a jury in a court of record within one year, unless he be a member of the regular panel.

SEC. 240. At least twenty days prior to the first day of any term at which a jury is to be selected, the auditor, or his deputy, must write out the names on the lists aforesaid which have not been previously drawn as jurors during the year on separate ballots, and the clerk of the district court, or his deputy, and sheriff having compared said ballots with the lists, and corrected the same, if necessary, shall place the ballots in a box provided for that purpose.

SEC. 241. After thoroughly mixing the same, the clerk, or his deputy, shall draw therefrom the requisite number of jurors to serve as aforesaid, and shall, within three days thereafter, issue a precept to the sheriff commanding him to summon the said jurors to appear before the court, as provided in section 230 of this chapter.

SEC. 243. Except when required at a special term which has been called in vacation, the grand jury need not be summoned after the first term, but must appear at the next term without summons under the same penalty as though they had been regularly summoned.

SEC. 244. Where, from any cause, the persons summoned to serve as grand or trial jurors fail to appear, or when from any cause the court shall decide that the grand or trial jurors have been illegally elected or drawn, the court may set aside the precept under which the jurors were summoned and cause a precept to be issued to the sheriff commanding him to summon a sufficient number of persons from the body of the county to serve as jurors at the term of court then being holden, which precept may be returnable forthwith, or at some subsequent day of the term, in the discretion of the court.

DEPUTIES.

SECTION 767. In the absence or disability of the principal, the deputy shall perform the duties of his principal pertaining to his own office; but when any officer is required to act in conjunction with or in the place of another officer, his deputy cannot supply his place.

SEC. 4255. The selecting, drawing, and summoning of the grand jury is as prescribed in the code of civil practice.

SEC. 4256. At a term of court at which grand jurors are required to appear, the panel shall be called, and the names of the grand jurors who shall appear shall be entered on the record. If fifteen grand jurors do not appear, or if the number appearing be reduced from any cause, either then or afterwards, to less than fifteen, the court may order the sheriff of the county to summon a sufficient number of qualified persons to complete the panel.

SEC. 4257. Persons summoned by the sheriff to supply a deficiency in the requisite number of grand jurors, serve only during the term at which they are summoned.

SEC. 4258. A defendant held to answer to a public offense, may challenge the panel of the grand jury, and the state or defendant may challenge an individual juror.

SEC. 4259. A challenge to an individual juror may be made by the State, for one or more of the following causes:

1. That he is related either by affinity or consanguinity nearer than in the fifth degree, or stands in the relation of agent, clerk, servant, or employe to any person held to answer for a public offense whose case may come before the grand jury;

2. That he is bail for any one held to answer for a public offense, whose case may come before the grand jury;

3. That he is defendant in a prosecution similar to any prosecution to be examined by the grand jury;

4. That he is, or within one year preceding has been, engaged or interested in carrying on any business, calling, or employment, the carrying on of which is a violation of law, and for which the juror may be indicted by the grand jury.

SEC. 4260. A challenge to the panel can be interposed only for the reason that they were not appointed, drawn, or summoned as prescribed by law;

SEC. 4261. A challenge to an individual juror by the defendant may be made for one or more of the following causes only:

1. That he is a minor, insane, or not competent by law to serve as such juror;

2. That he is a prosecutor upon a charge against the defendant;

3. Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial.

SEC. 4262. Challenges to the panel or to an individual juror, must be decided by the court.

SEC. 4263. If a challenge to the panel be allowed, the grand jury is prohibited from inquiring into the charge against the defendant by whom it was interposed. If the jury does so and finds an indictment the court must set it aside.

SEC. 4264. If a challenge to an individual juror be allowed, he shall not be present at or take any part in the consideration of the charge against the defendant.

SEC. 4265. The grand jury must inform the court of a violation of the last section, that it may be punished as a contempt.

SEC. 4266. When several persons are held to answer for one and the same offense, no challenge to the panel can be made unless they all join in such challenge, nor can any objection be interposed by a defendant to the grand jury or to any individual juror for any cause of challenge after they are sworn.

SEC. 4267. From the persons summoned to serve as grand jurors the court must appoint a foreman; the court must also appoint a foreman when the person already appointed is discharged, excused, or from any cause becomes unable to act before the grand jury is finally discharged.

SEC. 4268. The following oath must be administered to the foreman of the grand jury: "You, as foreman of the grand jury, shall diligently inquire and true presentment make of all public offenses against the people of this State, committed or triable within this county, of which you have, or can obtain legal evidence; you shall present no person through malice, hatred, or ill will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof, but in all your presentments you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding. So help you God."

SEC. 4269. The following oath must thereupon be administered to the other grand jurors present: "The same oath which your foreman has now taken before you on his part, you and each of you shall well and truly observe on your part. So help you God."

SEC. 4270. The grand jury being impaneled and sworn, may be charged by the court. In doing so, the court shall give them such information as it may deem proper as to

the nature of their duties, and any charges for public offenses returned to the court or likely to come before the grand jury. And it is hereby made the duty of the court to specially give in charge to the grand jury, the provisions of law regulating the accounting by public officers for fines and fees collected by them, and providing for the suppression of intemperance.

SEC. 4271. The grand jury on the completion of its business shall be discharged by the court. But whether its business be completed or not, it is discharged by the final adjournment thereof.

As to what instructions should be given to the grand jury depends upon circumstances, and is largely in the discretion of the judge. We here give a charge as given to the grand jury of Linn county, by Hon. John Shane, the presiding judge, which may be of value in many of the different counties in the State:

"Gentlemen of the Grand Jury:

"The law imposes upon you the duty of initiating proceedings against those who have violated the penal statutes of the State, in certain specified cases; and without such initiation on your part, the transgressors of those laws must go unpunished, and society will be left largely at the mercy of the criminals who are constantly preying upon it. In order the more fully to enable you to discharge your duties as grand jurors, the law imposes upon the judge of the court the duty of instructing you in the nature and character of your obligations as grand jurors, and particularly to call your attention to the provisions of the statutes of the State, which the General Assembly in its wisdom deem especially important. The duties and obligations of grand jurors, are of no ordinary character, and of no small magnitude, and much depends upon the manner and spirit in which those duties are discharged, whether the results will be acceptable or the consequences profitable to society or not. The grand jury alone, of all the tribunals established by law, is allowed in secret session to inquire into the acts and conduct of the citizen. All other judicial or semi-judicial tribunals must be open to the public, and all other tribunals sanctioned by law, are properly subject to criticism and rebuke. But the grand jury by its constitution is above and beyond criticism and rebuke; in fact, it is

an independent body, responsible for its acts to no power, save and except the responsibility which the oaths you have taken impose upon you individually and collectively. Hence, the importance that a grand jury should be composed of honest, conscientious and intelligent men, who will not only know what is right, but knowing the right dare to do it, in spite of friend or foe, in spite of public clamor or fear of private injury. In your line of duty the law gives you the power to act upon your own motion, or your own knowledge, as well as on information derived from others. And whenever you have reasonable grounds to believe that an indictable offense has been committed, triable within this county, it is your duty to send for the proper witnesses, ascertain the facts, and if upon investigation it shall appear to you that an indictable offense has been committed, triable within this county, then it is your duty to present the person or persons charged with the offense to this court by indictment, for trial, and if found guilty, for punishment, let the blow fall wherever it may. While it is your duty to indict the guilty, or those whom the evidence, as above explained, warrants you in believing guilty, it is equally your duty to guard and protect the innocent from unfounded charges or from malicious prosecutions.

It should be a maxim written in the heart and conscience of every grand juror, that no guilty man should escape where there is evidence to convict, and no innocent man should suffer. The grand jury should, and was intended to, be used to protect the innocent, the weak and helpless, and to punish the wrong-doer and the criminal, and if the time should ever come when it fails in its mission, it should be unceremoniously swept away and buried in the dead past. If you, as grand jurors, observe in its spirit the oath which your foreman and each one of you have taken the purpose for which you have been called together, will have been accomplished, and only the violators of the law will suffer. By that oath you, and each of you, have promised diligently to inquire into and true presentment make of all public offenses against the people of this State, committed or triable within this county, of which you have or can obtain legal evidence. You have promised that you will present no person through malice, hatred or ill

will; nor leave any unpresented through fear, favor or affection, or for any reward, or the promise or hope thereof, but that in all your presentments, you will present the truth, the whole truth and nothing but the truth. This oath is an epitome of all your duties as grand jurors; it is so concise, so terse, and yet so comprehensive, that to enlarge thereon would be a work of supererogation; and it is sufficient to say to you that an intelligent man cannot misunderstand it, and no one but a knave or a fool would violate it, and bring perjury into the grand jury room.

In addition to what has been said to you about your duties generally, as grand jurors, the law makes it my duty to call your attention especially to various provisions of the Code, which the people of the State, speaking through the General Assembly, deem of paramount importance. These provisions of the law are not deemed of paramount importance, because the crimes therein described are more, or as aggravated as many other crimes, for they are not; but it is because such crimes are so easily committed, and the punishment thereof so easily evaded, and oftentimes through the ignorance or dishonesty of the grand jury or other executors of the law. Among these provisions of the law, which I call your attention to especially, is the law regulating the accounting of public officers for fines and fees collected by them; and the provisions of the law relating to the suppression of intemperance. By the law of this State, all fines collected by officers for the violation of the penal code, should be paid into the public treasury, to be there disposed of according to law. Any officer collecting such funds and failing to account for the same; or any officer using or disbursing public funds otherwise than as provided by law, is guilty of a grave offense against the people, and should be promptly and severely punished. There can be no excuse for, or palliation of, such offenses, and it is not only especially the duty of the grand jury, but it is the duty of every citizen to aid and assist in ferreting out and punishing those who, in this or any other manner betray public trust, and bring our institutions into contempt. The enforcement of the laws for the suppression of intemperance is also made by law your especial duty, under your oaths, nor can you relieve yourselves of this duty on any

pretense or pretext whatever. It is not for you or me to determine that the laws on this or any other subject are unwise or impolitic, and hence, treat them as a nullity; but it is your duty if you have or can obtain evidence that the law has been violated in this county, to present the violators to this court by indictment, and it is my duty to pronounce the judgment of the law on such persons if found guilty, notwithstanding they may be my dearest friends, or notwithstanding I may conscientiously believe some other law would be wiser and better. Your oath binds you the same that mine binds me, and unless you violate your oaths, you should indict every person, irrespective of his station in life, against whom you have or can obtain evidence that would warrant his conviction, if unexplained by a petit jury. If the law is unwise or impolitic, it is for the General Assembly to repeal it, not for this court, or any of its officers, or the grand jury.

It is also your duty to inquire:

1st. Into the case of every person imprisoned in the county jail of the county on a criminal charge not indicted.

2d. Into the condition and management of the public prisons within this county.

3d. Into the willful and corrupt misconduct of all county officers.

4th. Into the obstruction of the highways.

You will give the subject to which your attention has been especially called, your careful consideration; but you will not omit to perform the other and general duties imposed upon you. It is for you to determine in a great measure, whether or not the penal laws shall be enforced in your county; if you should fail in your duty, then all other agencies for the punishment of criminals who commit indictable offenses must necessarily fail. In transacting your business you should also be governed by considerations of economy. In these times of deep depression of trade, low prices and general stagnation of business, it should be the object and purpose of every officer to curtail expenses whenever practicable; but this economy should not be at the expense of public safety. Every good citizen is willing to give his proportion of what is necessary to protect life and property, and every one in authority should see, so far as he has the power, that not a farthing of the

public funds is unnecessarily expended. It is your privilege, at all reasonable times, to ask the advice and counsel of the court in regard to such questions and matters as may come before you. The district attorney is your legal adviser, and will be with you and assist you by his advice in your labors. It is your duty to acquiesce when he advises as to any question of law that may arise. If he errs, the responsibility will be on him, not upon you. If you desire his presence at any time to examine the witnesses introduced before you, it is his duty to comply unless otherwise officially engaged. The law provides that every member of the grand jury must keep secret its proceedings and the testimony given before it, except he may be called upon to disclose in court the testimony of a witness examined by the jury. Nor are you permitted to discuss the fact that an indictment has been found against any person not in custody, otherwise than presenting them in open court. A violation of these provisions is a grave misdemeanor and subjects the offending grand juror to severe punishment. Your attention is especially called to this matter, inasmuch as in times past the law has been violated frequently by grand jurors in this respect, and the ends of justice have been defeated. Finally, gentlemen, allow me to say, that relying on your intelligence, honesty, and co-operation I feel assured that the purpose for which you have been called together and organized will be accomplished; that criminals of all classes will be promptly indicted, and that through your efforts, with the proper co-operation of the other branches of the court, crime may in some measure be stayed, and society be made to feel more safe.

COMPARING BALLOTS AND JURY LIST—DEPUTY SHERIFF INCOMPETENT.

Under section 767, Code of 1873, the deputy sheriff is not qualified to assist the clerk in comparing the ballots with the list of jurors. *State v. Dutell*, 4 G. Greene, 125; *State v. Brandt*, 41 Iowa, 602; *State v. Wilson*, 43 Ib., 688; *State v. Stutzman*, 44 Iowa, 703.

PANEL TO BE FILLED BY COURT, IF THE REQUIRED NUMBER DO NOT APPEAR.

If, by reason of challenges sustained to jurors, or from any

other cause, the grand jury becomes reduced to a less number than fifteen, the court should order the panel to be filled. Section 4256, Code of 1873, which is in substance the same as section 2881, Code of 1851, and section 4609, Rev. of 1860. *State v. Norris House*, 3 G. Greene, 513; *State v. Mooney*, 10 Iowa, 506; *State v. Ostrander*, 18 Ib., 435, 441; *State v. Garhart*, 35 Ib., 315.

THE SELECTION OF A LESS NUMBER THAN REQUIRED BY LAW.

The selection of seventy-three members, instead of seventy-five, as by section 234, Code of 1873 provided, is not such an error to the prejudice of a defendant as to vitiate an indictment. *State v. Ansaleme*, 15 Iowa, 44; *State v. Carney*, 20 Ib., 82; *State v. Brandt*, 41 Ib., 601.

THE NUMBER REQUISITE TO FIND AN INDICTMENT.

Under section 4291, Code of 1873, twelve grand jurors can legally find an indictment, although no more than twelve be impaneled. 2 Hall P. C., 151, 154; Coke Litt., 126, b.; 2 Hawk. P. C., 299; *Com. v. Wood*, 2 Cush., Mass., 149; *State v. Ostrander*, 18 Iowa, 435.

FOREMAN—APPOINTMENT OF BY COURT—TALESMEN.

The court may appoint, as foreman, one of the talesmen; and such appointment does not vitiate the indictment or proceedings. *State v. Brandt*, 41 Iowa, 593.

CHALLENGES BY DEFENDANT.

Under section 4258, Code of 1873, which is the same as section 4611, Rev. of 1860, the defendant may challenge the panel of the grand jury; and, the State or defendant may challenge an individual juror. *State v. Harris and Folsom*, 38 Iowa, 242.

WAIVER BY DEFENDANT EITHER IN PERSON OR BY ATTORNEY.

The right to challenge may be waived, either by the defendant in person or by attorney; and the attorney may exercise this right without the defendant's presence. *State v. Felter*, 25 Iowa, 67; *State v. Harris and Folsom*, 38 Ib., 242.

UNQUALIFIED OPINION CAUSE FOR CHALLENGE.

Where a juror has formed or expressed an unqualified

opinion that the defendant is guilty of the offense for which he is held to answer, it is a good cause for a challenge to an individual juror. *State v. Harris and Folsom*, 38 Iowa, 242; *State v. Gillick*, 7 Ib., 287.

CHALLENGE CANNOT BE INTERPOSED AFTER THE JURY IS SWORN.

Under section 4266, Code of 1873, which is the same as section 4611, Rev. of 1860, an objection to the grand jury, or an individual juror, cannot be interposed by a defendant, for any cause of challenge, after the jury are sworn. *State v. Duttell*, 4 G. Greene, 125; *State v. Norris House*, 3 Ib., 513; *State v. Dixon*, 3 Iowa, 416; *State v. Hinkle*, 6 Ib., 380; *State v. Ingalls and King*, 17 Ib., 9; *State v. Gibbs*, 39 Ib., 318.

EXEMPTION OF JURORS.

The law, under section 228, Code of 1873, exempts a person from being called on a jury if over 65 years of age, yet such is a personal privilege, and, if waived, does not invalidate an indictment. *Com. v. ———*, 16 Gratt., 519.

DISCHARGE—RE-IMPANELING DURING SAME TERM OF COURT.

The court has power and authority to re-impanel the grand jury after their discharge, and during the same term of court; and, also, such objections should be made before pleading to the indictment. *State v. Reid*, 20 Iowa, 413.

ARRAY.

Under the Iowa law there is no such thing as a challenge to the "array." There are but two kinds of challenges, to the panel, or to an individual juror. *State v. Davis*, 41 Iowa, 311.

TIME WHEN CHALLENGE TO THE PANEL SHOULD BE MADE.

A challenge to the panel must be made before the challenges are made to individual jurors, and in writing. *State v. Davis*, 41 Iowa, 311.

SETTING ASIDE THE INDICTMENT.

SECTION 4337. The motion to set aside the indictment can be made by the defendant on one or more of the following grounds, and must be sustained:

1. When it is not indorsed "a true bill," and the indorse-

ment signed by the foreman of the grand jury as prescribed by this code;

2. When the names of all the witnesses examined before the grand jury are not indorsed thereon; when the minutes of the evidence of the witnesses examined before the grand jury are not returned therewith;

3. When it has not been presented and marked "filed" as prescribed by this code;

4. When any person, other than the grand jurors, was present before the grand jury when the question was taken upon the finding of the indictment, or when any person, other than the grand jurors, was present before the grand jury during the investigation of the charge, except as required or permitted by law;

5. That the grand jury were not selected, drawn, summoned, impaneled, or sworn, as prescribed by law.

SEC. 4338. A motion to set aside the indictment on the ground that the names of all the witnesses examined before the grand jury are not indorsed thereon; or that the name of any other witness than those so examined is indorsed thereon, as prescribed in the second subdivision of section four thousand three hundred and thirty-seven hereof, shall not be sustained if the indorsement is corrected by the insertion or striking out of such names or name by the district attorney or the clerk of the court, under the direction of the court, so as to correspond with the minutes required to be kept by the clerk of the grand jury and returned and preserved with the indictment to the court.

SEC. 4339. The ground of the motion to set aside the indictment mentioned in the fifth subdivision of section four thousand three hundred and thirty-seven hereof, is not allowed to a defendant who has been held to answer before indictment.

SEC. 4340. The motion must be heard when it is made, unless for good cause the court postpone the hearing to another time.

SEC. 4341. If the motion be denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto.

SEC. 4342. If the motion be granted, the court must order the defendant, if in custody, to be discharged, or if admitted to bail, that his bail be exonerated; or if he has deposited money instead of bail, that the money deposited be refunded to him, unless the court direct that the case be resubmitted to the same or another grand jury.

SEC. 4343. If the court direct that the case be recommitted, the defendant, if already in custody, must so remain unless he be admitted to bail; or, if already admitted to bail, or money

has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment.

SEC. 4344. An order to set aside the indictment as provided in this chapter, shall be no bar to a future prosecution for the same offense.

TRUE BILL SIGNED BY FOREMAN—DISCREPANCY IN FOREMAN'S NAME.

The fact that the foreman signed himself "J. T." instead of James T. Thornburg is not sufficient to set aside the indictment. *State v. Groome*, 10 Iowa, 309.

ADMISSION OF INCOMPETENT EVIDENCE BEFORE A GRAND JURY.

The admission of incompetent evidence by the grand jury, on an investigation before them on which an indictment is found, is not sufficient grounds to set aside an indictment, under subdivision four, section 4337, Code of 1873. *State v. Tucker*, 20 Iowa, 508.

PRESENCE OF A BAILIFF BEFORE A GRAND JURY.

The mere presence of a bailiff in attendance upon the grand jury during their investigation, is not a sufficient ground of objection against the indictment, if he was not present when the question was taken upon the finding of the indictment. *State v. Kimball*, 29 Iowa, 267.

MINUTES OF EVIDENCE.

The fact that the minutes of the evidence do not show that there was sufficient evidence to sustain the finding of the grand jury, is no cause for quashing or setting aside the indictment. *State v. Morris*, 36 Iowa, 272.

ONE WHO WAS HELD TO ANSWER CANNOT MOVE TO SET ASIDE.

Where the defendant was held to answer he cannot move to set aside the indictment, for the reason that the grand jury was not drawn, selected, summoned, or sworn, as prescribed by law. *State v. Wood*, 17 Iowa, 18; *State v. Ingalls*, 17 Ib., 8; *State v. Howard*, 10 Ib., 101; *State v. Ostrander*, 18 Ib., 435; *State v. Gibbs*, 39 Ib., 319.

FAILING TO RETURN THE NUMBER OF JURORS.

The fact that seventy-three instead of seventy-five names were returned by the trustees to select a grand jury from, is

not sufficient ground to set aside the indictment. *State v. Brandt*, 41 Iowa, 593.

ERROR WITHOUT PREJUDICE TO DEFENDANT.

If the errors and defects, in the selecting and summoning a grand jury, are not of such a character as to affect the substantial rights of the defendant, the indictment should not be set aside, otherwise it should. *State v. Ansaleme*, 15 Iowa, 44; *State v. Carney*, 20 Ib., 82; *State v. Brandt*, 41 Ib., 600.

EXAMINATION OF WITNESSES BEFORE GRAND JURY—NAMES OF, AND TESTIMONY NOT RETURNED WITH INDICTMENT.

The fact that witnesses were examined and neither their names nor evidence were returned with the indictment is no cause to set aside the indictment, for if witnesses were before the jury, who knew nothing in relation to the case, it would be useless to return their names. *State v. Little*, 42 Iowa, 51.

MOTION MUST BE DISTINCT AND POINT OUT THE ERRORS.

A motion to set aside is like that of a demurrer; the defendant must specify wherein the indictment is insufficient. *State v. Mauer*, 7 Iowa, 407.

AFFIDAVITS OF GRAND JURORS.

Affidavits of grand jurors that they did not assent to the finding of the indictment are not admissible in support of a motion to set it aside. They cannot be heard to deny that they assented to it, in the form it is presented. *State v. Mewhirter*, 46 Iowa, 88.

SUPREME COURT.

The Supreme Court, on a proper case, or showing being made, may reduce a sentence. *State v. Madden*, 35 Iowa, 511.

The court will cautiously interfere in setting aside verdicts when on the ground, that the same is against the evidence. *State v. Tomelinson*, 11 Iowa, 401; *State v. Johnson*, 19 Ib., 229; *States v. Collins*, 20 Ib., 97. And where two verdicts are alike, it has its bearing with the court. *Jourdan v. Reed*, 1 Ib., 135; *State v. Cross*, 12 Ib., 66. And will not set aside or reverse a judgment on the ground that the verdict is

against the evidence, unless all of the evidence is certified up. *State v. Crawford*, 11 Iowa, 143; *State v. Malling*, 11 Ib., 240; *State v. Pitts*, 11 Ib., 343. Nor will the court reduce or interfere with the sentences or punishments unless all of the evidence is certified up. *State v. Harris*, 36 Iowa, 269.

SURRENDER OF THE DEFENDANT.

SECTION 4593. At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the officer to whose custody he was committed at the time of giving bail, in the following manner:

1. A certified copy of the undertaking of bail must be delivered to the officer, who shall detain the defendant in his custody thereon as upon a commitment, and must, by a certificate in writing, acknowledge the surrender;

2. Upon the undertaking and the certificate of the officer, the District Court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during term time, at the same term, and upon three clear day's notice thereof to the district attorney, with a copy of the undertaking and certificate, may order the bail to be exonerated.

SEC. 4594. For the purpose of surrendering the defendant, the bail, at any time before they are finally charged, and at any place within the State, may themselves arrest him, or by a written authority indorsed on a certified copy of the undertaking may empower any person of suitable age and discretion to do so.

SEC. 4595. If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, shall surrender himself to the officer to whom the commitment was made, or directed in the manner prescribed in this chapter, the court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during the term, at the same term, must order a return of the deposit to the defendant, upon producing a certificate of the officer showing the surrender, and upon three clear days' notice to the district attorney, with a copy of the certificate.

BAIL SURRENDER OF PRINCIPAL.

Where the bail or sureties desire to release themselves of the bail which they have given for the appearance of the defendant, they must furnish a certified copy of their undertaking to the officer to whom the defendant is about to be surren-

dered. The voluntary surrender of the defendant is not sufficient, nor can the officer hold such prisoner without a certified copy of the undertaking. The statute speaks in positive terms, "*must*" furnish such certified copy, and the sheriff or jailor cannot detain such prisoner without it. *State v. Beebe*, 13 Kansas, 589; 19 Am. R., 93.

TRIAL OF AN ISSUE OF FACT.

SECTION 4419. The provisions of the code of civil practice, relative to the continuance of the trial of civil causes, shall apply to the continuance of criminal actions, except that no judgment for costs shall be rendered against a defendant in a criminal action on account of such continuance, and except as in this code otherwise provided; and except that the defendant shall, if he, upon entering his plea demand it, be entitled to three days in which to prepare for trial.

SEC. 4420. The jury having been impaneled and sworn, the trial must proceed in the following order:

1. The clerk or district attorney must, if the indictment be for a felony, read it, and state the defendant's plea to the jury. In all other cases this formality may be dispensed with;

2. The district attorney must then offer the evidence in support of the indictment;

3. The defendant or his counsel may then offer his evidence in support of his defense;

4. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

5. When the evidence is concluded, unless the case is submitted to the jury on either side, or both sides, without argument, the district attorney must commence, the defendant follow by one or two counsel at his option, unless the court shall permit him to be heard by a larger number, and the district attorney conclude, confining himself to a response to the arguments of the defendant's counsel, provided that where two or more defendants are on trial for the same offense they may be heard by one counsel each, and provided further, that the court, when the affirmative of the issue is with the defendant, may, in its discretion, award to the defendant the last argument;

6. The court shall then charge the jury in writing, without oral explanation or qualification.

LAWS OF 1878, CHAPTER. 19.

AN ACT to Repeal Section 4420, of Chapter 27, Title 25, of the Code, Relating to the Trial of an Issue of Fact in an Indictment, and enacting a Substitute in lieu Thereof.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That section 4420, chapter 27, title 25, of the Code be, and the same is hereby repealed, and the following enacted in lieu thereof:

SEC. 4420. The jury having been impaneled and sworn, the court must proceed in the following order:

1. The clerk or district attorney must read the indictment and state the defendant's plea to the jury, and the district attorney may briefly state the evidence by which he expects to sustain the indictment.

2. The attorney for the defendants may then briefly state his defense, and the evidence by which he expects to sustain it.

3. The State may then offer the evidence in support of the indictment.

4. The defendant or his counsel may then offer his evidence in support of his defense.

5. The parties may then respectively offer rebutting evidence only, unless the court, for good reasons in furtherance of justice, permit them to offer evidence upon their original case.

6. When the evidence is concluded, unless the case is submitted to the jury on both sides without argument, the district attorney must commence, the defendant follow by one or two counsel at his option, unless the court shall permit him to be heard by a larger number, and the district attorney conclude, confining himself to a response to the arguments of the defendant's counsel; *Provided*, That where two or more defendants are on trial for the same offense, they may be heard by one counsel each; *and, Provided further*, That the court, when the affirmative of the issue is with the defendant, may, in its discretion, award to the defendant the last argument.

7. The court shall then charge the jury in writing, without oral explanation or qualification.

Approved, February 23, 1878.

SEC. 4421. The district attorney, in offering the evidence in support of the indictment, in pursuance of the order prescribed in the last section, under the second subdivision thereof, shall not be permitted to introduce any witness that was not examined before the grand jury, and the minutes of whose testimony was not taken by the clerk of the grand jury, and presented with the indictment to the court, unless he shall have given to the defendant a notice in writing, stating

the name, place of residence and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial.

LAWS OF 1878, CHAPTER 168.

SECTION 3. That section 4421 of the Code be amended by adding thereto the following: *Provided*, That whenever the district attorney desires to introduce evidence to support the indictment, of which he shall not have given said four days' notice because of insufficient time therefor since he learned said evidence could be obtained, he may move the court for leave to introduce such evidence, giving the name, place of residence and occupation of the witnesses he desires to introduce, and the substance of what he expects to prove by said witnesses, and showing diligence such as is required in a motion for a continuance supported by affidavit, whereupon, if the court sustain said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify; and if said defendant shall not elect to have said cause continued, the district attorney may examine said witness in the same manner and with the same effect as though four days' notice thereof had been given defendant as hereinbefore provided; except that the district attorney, in the examination of said witnesses, shall be strictly confined to the matters set out in his motion.

Approved, March 26, 1878.

SEC. 4422. When the defendant's only plea is a former conviction or acquittal, the order prescribed in the second and third sub-divisions of the sections immediately preceding the last shall be reversed, and the defendant shall first offer his evidence in support of his defense.

SEC. 4423. The court shall not restrict counsel as to time in their arguments.

SEC. 4424. When two or more defendants are jointly indicted for felony, any defendants requiring it may be tried separately. In other cases defendants jointly indicted may be tried separately or jointly, in the discretion of the court.

SEC. 4425. Upon a trial for a conspiracy, in a case where an overt act is required by law to constitute the offense, the defendant cannot be convicted unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved; but other overt acts, not alleged in the indictment, may be given in the indictment.

SEC. 4426. The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided.

SEC. 4427. The confession of the defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that the offense was committed.

SEC. 4428. Where there is a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal.

SEC. 4429. Where there is a reasonable doubt of the degree of the offense of which the defendant is proven to be guilty, he shall only be convicted of the lower degree.

SEC. 4430. If it appear by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment, the court may direct the jury to be discharged and all proceedings on the indictment to be suspended, and may order the defendant to be committed or continued on bail to answer any new indictment which may be found against him for the higher offense.

SEC. 4431. If the indictment for the higher offense be submitted by the grand jury or be not found at the next term, the court must proceed to try the defendant on the original indictment.

SEC. 4432. Whenever, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which shall be shown them by a person appointed by the court for that purpose. The officers must be sworn to suffer no person to speak to or communicate with the jury, on any subject connected with the trial, nor to do so themselves, except the person appointed by the court for that purpose, and that only to show the place to be viewed, and to return them into court without unnecessary delay at a specified time.

SEC. 4433. If a juror have any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial; and, if during the retirement of the jury, a juror declare any fact which could be evidence in the cause, as of his own knowledge, the jury must return into court and the juror must be sworn as a witness, and examined in the presence of the parties, if his evidence be admissible.

SEPARATION OF JURY.

SEC. 4434. The jurors sworn to try an indictment, may, at any time before the final submission of the cause to them, in the discretion of the court, be permitted to separate, except where one of the parties object thereto, or be kept together in charge of proper officers. The officers must be sworn to keep the jury together during the adjournment of the court, and

to suffer no person to speak to or communicate with them on any subject connected with the trial, nor do so themselves, and to return them into court at the time to which it adjourns.

SEC. 4435. The jury, whether permitted to separate, or kept together in charge of sworn officers, must be admonished by the court that it is their duty not to permit any person to speak to or communicate with them on any subject connected with the trial.

SEC. 4436. The court shall, on the trial of every indictment, when requested by either party, keep, or cause to be kept, by some person for that purpose by it appointed, full and accurate minutes of the testimony of each witness examined on the trial, showing the name of the witness, the place of residence, and his occupation, as well as of any oral evidence introduced, either by the state or defendant, after a plea or verdict of guilty, to be considered by the court in aggravation or alleviation of the punishment in pronouncing sentence against the defendant, which shall be certified to be full and accurate by the judge, and signed by him, and filed with the clerk, and so marked by him, which shall be deemed a part of the record of the cause. The person who acts under such an appointment shall be entitled to such compensation for his services as may be allowed by the court, which shall be paid by the proper county, and shall be taxed as costs.

SEC. 4437. Upon an indictment against several defendants, any one or more may be convicted or acquitted.


SEC. 4438. On the trial of an indictment for libel, the jury have the right to determine the law and the fact.

SEC. 4439. On the trial of an indictment for any other offense than libel, questions of law are to be decided by the court; saving the right of the defendant and the State to except. Questions of fact are to be tried by jury. And although the jury have the power to find a general verdict which includes questions of law as well as fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.

INSTRUCTIONS.

SEC. 4440. The court shall, on motion of either party, instruct the jury on the law applicable to the case, which must always be in writing, signed by the judge and filed with the clerk, and so marked by him, and it is to be deemed a part of the record of the cause, and no oral qualification thereof shall be permitted.

SEC. 4441. Any instruction asked by either party to be given by the court must be in writing, and must be either



given or refused, and so marked and signed by the judge, and filed with the clerk, and so marked by him, and is to be deemed a part of the record. It may be qualified in writing by the court, but not orally, and the qualification must be distinguished, intelligibly, from the instruction as originally asked by the party, and signed by the judge.

SEC. 4442. After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place without meat or drink, water excepted, and not to suffer any person to speak to or communicate with them, nor speak to or communicate with them themselves unless it be to ask them whether they have agreed upon their verdict, and not to communicate to any one the state of their deliberation or the verdict agreed upon, until after the same shall have been declared in open court, and received by the court, and to return them into court when they shall have so agreed upon their verdict, unless by permission or order of the court, or they be sooner discharged.

DISCHARGE OF JURY.

SEC. 4443. If before the conclusion of a trial a juror become sick so as to be unable to perform his duty, the court may order him to be discharged, and in such case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards be impaneled.

SEC. 4444. The court may also discharge the jury where it appears that it has not jurisdiction of the offense, or that the facts as charged in the indictment do not constitute an offense punishable by law.

SEC. 4445. If the jury be discharged because the court has not jurisdiction of the offense charged in the indictment, and it appear that it was committed out of the jurisdiction of this State, the defendant must be discharged or ordered to be retained in custody a reasonable time, until the district attorney shall have a reasonable opportunity to inform the chief executive of the State in which the offense was committed of the facts, and for said officer to require the delivery of the offender.

SEC. 4446. If the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as shall be deemed reasonable to await a warrant from the proper county for his arrest; or, if the offense be bailable, he may be admitted to bail in an undertaking with sufficient sureties that

he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county, and if not sooner arrested thereon will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly designated in the undertaking, to surrender himself upon the warrant, if issued, or that the bail will forfeit such sum as the court may fix, to be mentioned in the undertaking.

SEC. 4447. In the case provided for in the last section, the clerk must transmit, forthwith, a certified copy of the indictment and all the papers in the action filed with him, except the undertaking mentioned in the last section, to the district attorney of the proper county.

SEC. 4448. If the defendant be not arrested on a warrant from the proper county he shall be discharged from custody, or his bail in the action shall be exonerated, or money deposited instead of bail shall be refunded, as the case may be, and the sureties in the undertaking must be discharged.

SEC. 4449. If he be arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate.

SEC. 4450. If the jury be discharged because the facts set forth do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged therefrom, or if admitted to bail, that his bail be exonerated, or if he has deposited money instead of bail, that the money deposited be refunded, unless in its opinion a new indictment can be framed upon which the defendant can be legally convicted, in which case the court may direct that the case be submitted to the same or another grand jury.

SEC. 4451. When a defendant, having given bail, appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer to abide the judgment or further order of the court; and he shall be committed and held in custody accordingly.

CONTINUANCE.

SECTION 2691. When either party shall amend any pleading or proceeding, the case shall not be continued in consequence thereof, unless the court shall be satisfied by affidavit or otherwise, that the adverse party could not be ready for trial in consequence of such amendment. But if the court is thus satisfied, a continuance may be granted to some day in the same term, or the next term of said court.

SEC. 2748. When time is asked for making application for continuance, the cause shall not lose its place on the calendar,

or it may be continued at the option of the other party, and at the cost of the party applying therefor; for which cost, judgment may at once be entered by the clerk unless the contrary be agreed between the parties.

SEC. 2749. A continuance shall not be granted for any cause growing out of the fault or negligence of the party applying therefor; subject to this rule, it may be allowed for any cause which satisfies the court that substantial justice will thereby be more nearly obtained.

SEC. 2750. Motions for continuance on account of the absence of evidence, must be founded on the affidavit of the party, his agent, or attorney, and must state:

1. The name and residence of such witness, or, if that be not known, a sufficient reason why not known, and also, in either case, facts showing reasonable grounds of belief that his attendance or testimony will be procured at the next term;

2. Efforts, constituting due diligence, which have been used to obtain such witness, or his testimony;

3. What particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove, and that the affiant believes them to be true, and that he knows of no other witness by whom such facts can be fully proved.

SEC. 2751. If the application is insufficient, it shall be overruled; if held sufficient, the cause shall be continued, unless the adverse party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the court to be properly stated.

SEC. 2752. The motion must be filed on the second day of the term, if it is then certain that it will have to be made before the trial, and as soon thereafter as it becomes certain that it will so need to be made, and shall not be allowed to be made when the cause is called for trial, except for cause which could not, by reasonable diligence, have been before that time discovered, and if made after the second day of the term, the affidavit must state facts constituting an excuse for the delay in making it. If time is taken when the case is called to make such motion, the motion shall be made and determined as soon as the court opens after the next ordinary adjournment.

SEC. 2753. The application shall be amended but once, unless by permission, to supply a clerical error.

SEC. 2754. To such motion, both as original and as amended, the adverse party may, at once, or within such reasonable time as the court shall allow, file written objections

stating wherein he claims that the same is insufficient, and on such motion and objections no argument shall be heard unless the court desire it.

SEC. 2755. Such motion and objections shall be a part of the record, and error in refusing a continuance or in compelling an election, may be reviewed.

SEC. 2756. No copy need be served of a motion for continuance or of objections thereto, but a notice of such motion shall be entered on the notice book.

SEC. 2757. Every continuance granted upon the application of either party, shall be at the costs of such party, unless otherwise ordered by the court.

SEC. 2758. The court shall grant continuance whenever the parties agree thereto, and provide as to costs as may be stipulated.

SEC. 2759. A case continued remains for all purposes except a trial on the facts.

SEC. 2760. Where the defenses are distinct, any one of several defendants may continue as to himself.

Motion for Continuance.

STATE OF IOWA, }
vs. } In District Court of . . . county, Iowa, June term, 187 . .
A . . . B . . . }

Now comes the defendant and asks this court to grant him a continuance in the above entitled cause until the next term of this court (or, if in justice's court, insert until the . . . day of . . .), for reasons fully set out in his affidavit. And in support of said motion files the following affidavit:

C . . . D . . . , Attorney for Defendant.

STATE OF IOWA, } ss.
LINN COUNTY. }

I, A. B. being duly sworn, upon oath do say, that I am the defendant in the above entitled cause, and am held for trial on the charge of grand larceny, and that one L. M. is a material witness in my behalf, in the above cause, and without whose evidence I cannot safely proceed to trial at this term; that said L. M. resides at Afion, Union county, State of Iowa, and that I expect to prove the following facts by the said L. M., to-wit: That on the second day of September, 1876, the time that the alleged offense should have been committed in the county of Linn, the said L. M. and myself, were in Ames, in the county of Story, in the State of Iowa, and had been there for two months previous to that date, and were at that place after that date and up to the first day of November in 1876, and were at that place and during all of that time working together as partners in manufacturing spring bed bottoms. And during all of said time, to-wit: from the second day of July, 1876, to the first day of November, 1876, I was not absent from said town of Ames; all of which was within the personal knowledge of said L. M., as we were together each day of said time; that on the second day of November, 1876, we dissolved the partnership existing between us, and closed up all our affairs; and that on the 6th day of November, 1876, I removed from said town of Ames to the city of Cedar Rapids, in the county of Linn, aforesaid, and that about that time said L. M. removed to the southern part of the State, and that since said time I have not seen said L. M., nor had any correspondence with him and knew nothing of his whereabouts until within a few days previous to the commencement of the present term of this court, to-wit: on the fourth day of June, 1877, when I was reliably informed that said L. M. is at present residing in Afion, in county and State aforesaid; that as soon as I received said information, I at once procured a subpoena from the clerk of the District Court of Linn county, Iowa, for said witness, and forwarded the same immediately to the sheriff of Union county, Iowa, with sufficient directions to said sheriff to serve said subpoena at once, and make a return of his doings without delay to this court; that the same has not yet been returned, nor have I heard from the same since that time,

and that this affiant has every reason to, and does, believe that the attendance or testimony of said witness will be procured at the next term of this court; and that this affiant knows that the facts above set out he can prove by said witness, and the same are true, and that he knows of no other witness by whom such facts can be proved.

A . . . B . . .

Subscribed and sworn to before me this . . . day of . . . 187 . .

A . . . B . . .

CONTINUANCE—DISCRETIONARY POWER OF COURT.

In determining applications for continuances a court cannot act arbitrarily, nor in violation of the manifest rights of parties. And yet much must necessarily be left to the sound discretion of the judge hearing the same. *State v. Cox*, 10 Iowa, 351; *Purrington v. Frank*, 2 Ib., 561; *Childs v. Heaton*, 11 Ib., 271; *Same v. Arnold*, 11 Ib., 246; *State v. Cross*, 12 Ib., 66; *State v. Rorabacher*, 19 Ib., 155; *State v. McComb*, 18 Ib., 43; *State v. Reid*, 20 Ib., 413.

DISCRETION IN CERTAIN CASES.

When the application is made to obtain testimony impeaching the character of an adversary's witness, the matter rests even more peculiarly in the discretion of the court below, and this court should seldom, if ever, interfere therewith. *State v. Rorabacher*, 19 Iowa, 157.

REASONABLE GROUNDS FOR BELIEF OF ATTENDANCE.

An application for continuance, upon the ground of the absence of a witness, must state facts showing reasonable grounds of belief that his attendance or testimony will be procured by the next term. A mere statement of belief will not be sufficient. *State v. Rorabacher*, 19 Iowa, 157.

COUNTER AFFIDAVITS—RIGHT OF STATE TO FILE DOUBTFUL.

The right of the State to introduce counter affidavits in resistance to defendant's motion, and showing for the continuance of a criminal cause, is doubted. *State v. Bowers*, 17 Iowa, 46.

ON GROUND OF ABSENCE OF ATTORNEY.

The court may, in the exercise of its discretion, grant a continuance on account of the absence of counsel. As to this, there is no doubt. But when an application based on this ground is refused, there must be a clear showing of an abuse of discretion. *Brady v. Malone*, 4 Iowa, 147.

DILIGENCE, APPLICATION MUST SHOW.

When the application is filed, on account of the absence of witnesses, it must be shown that due diligence has been used to procure the attendance of said witnesses. But to state generally that diligence has been used is insufficient, as the affiant must set forth and state specially what has been done. The court is the judge of its sufficiency and not the affiant. *Brady v. Malone*, 4 Iowa, 149; *State v. Spurbeck*, 44 Iowa, 667. And must avail himself of the statutory rights for obtaining witnesses. *Day v. Gelston*, 22 Ill., 102; *State v. Cross*, 12 Iowa, 67.

APPLICATION CONSTRUED AGAINST APPLICANT.

As a general rule, applications for continuance should be construed strictly and most strongly against the applicant. *Mason v. Anderson*, 3 Mon., 293; *Auras v. State*, 2 Litt., 233; *Brady v. Malone*, 4 Iowa, 149.

MUST STATE RESIDENCE OF WITNESS, AND WHAT IS EXPECTED TO BE PROVEN.

An application which does not state the names of the witnesses, nor what facts affiant expects to prove by them, or show some excuse therefor, is defective and should be overruled. *State, ex rel. The Attorney General, v. Tilghman*, 6 Iowa, 496; and that affiant knows no other witness by which such facts can be proved. *State v. Sater*, 8 Iowa, 420; *State v. Williams*, 8 Ib., 533; and that the facts are relevant to the issue. 8 Ib., 535.

ADMISSION BY STATE OF STATEMENTS IN APPLICATION.

Where the State admits, that if the witness whose name is mentioned in the motion for continuance would swear, if present, to the facts as stated in the affidavit, the motion should be overruled. *State v. Mooney*, 10 Iowa, 510. But such admission does not admit that the facts sworn to by the witness are true, nor does it admit immaterial matter. *State v. Sater*, 8 Iowa, 421. Nor can the State impeach said witness upon the trial. 22 Ib., 435. Nor does it preclude any objections which might have been made had the witness been present. *State v. Geddis*, 42 Iowa, 264.

MATTER OF RIGHT—TO FIRST TERM AFTER INDICTMENT FOUND.

A defendant is not entitled as a matter of right, under Sec. 3006, Rev. of 1860, to a continuance of a cause to the term after that at which the indictment is found if he has been held to answer on a preliminary examination. *State v. Arnold*, 12 Iowa, 480; *State v. McComb*, 18 Ib., 44. If not so held he cannot be compelled to go to trial at the term the indictment is found. *State v. Harris*, 36 Iowa, 268; *Same v. Same*, 33 Ib., 356. The sections upon which the last cases cited are based were not incorporated into the Code of 1873, and a defendant under the Code is not entitled to the second term as a matter of right.

ON GROUND OF ABSENCE OF A PARTY.

When a party asks for a continuance on the ground of his inability to attend the trial, and that his evidence is material, the court should require a stricter showing of diligence than when the witness is not a party. *Gates & Co. v. Hamilton & Dishon*, 12 Iowa, 50.

ADMISSION OF STATEMENTS ON FIRST TRIAL NOT BINDING ON SECOND.

Where the facts stated in an affidavit for continuance on the ground of absent witnesses are admitted by the State, such affidavit is not admissible on the second trial. *State v. Felter*, 32 Iowa, 50.

RULING OF LOWER COURT PRESUMED CORRECT.

Where an application for continuance has been overruled by the court below the presumption is in favor of the ruling, and error must be affirmatively shown. *Woolheather v. Risley*, 38 Iowa, 486.

APPLICATION APPLIES TO STATE AS WELL AS DEFENDANT.

The State, as well as the defendant, is entitled to a reasonable time in which to procure the attendance of witnesses, and prepare for trial. *State v. Painter & Lindley*, 40 Iowa, 298.

SHOULD BE MADE ON SECOND DAY OF TERM.

The application should be made by the second day of the term, or excuse shown for the delay. Code of 1873, Sec. 2752; *Brotherton v. Brotherton*, 41 Iowa, 112.

JOINT AND SEPARATE TRIALS.

In case of a felony, where two are jointly indicted, any defendant requiring it has the right to be tried separately, under section 4424, Code of 1873; but in case of a misdemeanor, it is discretionary with the court as to whether a joint or separate trial shall be had; and in the latter cases the State, as well as the defendant, has a right to ask for and obtain a separate trial. *State v. Marvin*, 12 Iowa, 501; *State v. Gigher*, 23 Iowa, 318; and where there is no statutory provision giving the court authority to try a criminal cause without a jury, a jury cannot be waived, even by consent of the defendant. 9 Mich., 194.

COSTS—JUDGMENT ON JOINT TRIAL.

Where several defendants are jointly tried a separate judgment must, notwithstanding, be rendered as against each defendant. *State v. Hunter*, 33 Iowa, 361.

NOTICE BY PROSECUTOR TO DEFENDANT OF THE INTRODUCTION OF WITNESSES WHO WERE NOT BEFORE THE GRAND JURY.

Under section 4421, Code of 1873, where the prosecutor desires to introduce witnesses who were not before the grand jury, he must serve a written notice on the defendant of his intention so to do, at least four days before the trial. The service of such notice may be made by any person and shown by an affidavit of the person serving the same. *State v. Ostrander*, 18 Iowa, on page 453. See also *State v. Abrahams*, 6 Iowa, 117. And where the defendant accepted service of notice he cannot afterwards object for the reason that the notices were not signed by the district attorney. *State v. Watrous*, 18 Iowa, 490; nor for the reason that he is or was an accomplice and his evidence not reported by the grand jury, if the notice to introduce was served. *State v. Stanly*, Western Jurist, June No., 1878, page 379.

PRESENCE OF DEFENDANT.

See "Arraignment."

SEPARATION OF JURY.

Under section 4434 the jury may separate, under the direction of the court, at the various adjournments, before the

final submission of the cause to the jury. *State v. Howard & Cress*, 10 Iowa, 100; *State v. Felter*, 25 Iowa, 67.

DISCHARGE OF JURY.

Where the jury fail to agree, it is a matter of discretion with the court as to the time of their discharge. *State v. Redman*, 17 Iowa, 329.

MISCONDUCT OF JURY.

See "New Trials."

INSTRUCTIONS.

Instructions applicable to particular crimes will be found under the head of the crime to which it applies. Here also are cited, under the head of "Instructions generally," all cases in which decisions are made in relation to questions of instructions, and also various questions decided, in relation to instructions.

INSTRUCTIONS GENERALLY.

State v. Greene, 1 Iowa, 424; *Brewington v. Swan*, 1 Ib., 121; *Ewing v. Scott et. al.*, 2 Ib., 447; *Rawlins v. Tucker*, 3 Ib., 213; *Talta v. Lusk*, 4 Ib., 470; *McKell v. Wright, Evans & Co.*, 4 Ib., 504; *State v. Moran*, 7 Ib., 237; *State v. Gillick*, 7 Ib., 287; *State v. Gebhart*, 13 Ib., 473; *State v. Watrous*, 13 Ib., 490; *State v. Carnahan*, 17 Ib., 256; *State v. Turner*, 19 Ib., 144; *State v. Collins*, 20 Ib., 85; *Owen v. Owen*, 22 Ib., 270; *State v. Benhame*, 23 Ib., 154; *State v. Arthur*, 23 Ib., 430; *State v. Brainard*, 25 Ib., 572; *State v. O'Hagan*, 38 Ib., 504; *State v. Donn timer*, 40 Ib., 340; *State v. Fraunburg*, 40 Ib., 555; *State v. Woodson*, 41 Ib., 428; also *Wood v. Maines*, 1 G. Greene, 275, 401; *State v. Harriman*, 2 G. Greene, 280; *Pritchard v. Overman*, 3 G. Greene, 551; *State v. Houston*, 4 G. Greene, 437; *Parker v. Pierce*, Ib., 452.

WORD "BELIEVE."

Where the instruction commences with the word, "If you believe from the evidence," etc., it is not erroneous, "believe" in such connection being synonymous with "find." *State v. O'Hagan*, 38 Iowa, 504.

COURT SHOULD NOT INSTRUCT ON MATTERS OF FACT, BUT SIMPLY
ON QUESTIONS OF LAW.

It is not within the province of a judge to instruct a jury what facts are proved. He may explain to them the legal effect of facts, but the facts themselves are to be ascertained exclusively by the jury. *Wood v. Maines*, 1 G. Greene, 275; *Frederick v. Gaston*. 1 Ib., 401; *State v. Houston*, 4 G. Greene, 437.

MAY REFER TO THE ACTS ALLEGED.

While it is true that the court should not instruct on facts, nevertheless it is not erroneous to instruct that if certain facts were proved the jury should find so and so, and support the law as against certain acts or violations. *Pritchard v. Overman*, 3 G. Greene, 531.

EXCEPTIONS TO RULING OF COURT BELOW.

Error in refusing to instruct, or in giving erroneous instructions, will not be considered in the appellate court, unless excepted to at the time of ruling. *Parker v. Pierce*, 4 G. Greene, 452; *Brewington v. Patton and Swan*, 1 Ib., 121; *State v. Harriman*, 2 G. Greene, 280; *Ewing v. Scott et al.*, 2 Iowa, 447; *Cuttler v. Fanning*, 2 Ib., 580; *Rawlins v. Tucker*, 3 Ib., 213; *Talty v. Lusk*, 4 Ib., 470; *McKell v. Wright, Evans & Co.*, 4 Ib., 504; *State v. Moran*, 7 Ib., 237.

INSTRUCTIONS SHOULD BE READ TO THE JURY—WAIVER OF.

While instructions should be read to the jury, yet where the court fails to do so, and hands them to the jury without reading and without objection, the party cannot take advantage of that after the verdict. *Talty v. Lusk*, 4 Iowa, 470.

SHOULD BE FILED WITH CLERK AND SIGNED BY THE JUDGE.

Under section 4441, the appellate court will not review the ruling of the court below in giving or refusing instructions when they were not signed by the judge and are not part of the record. *State v. Gebhardt*, 13 Iowa, 473; *State v. Watrous*, 13 Ib., 490.

REASONS FOR RULES.

In giving instructions to a jury the court should state rules

of law, but is not bound to give reasons for such rules. *State v. Turner*, 19 Iowa, 144.

METHOD OF INSTRUCTING A JURY.

The practice of giving instruction, to the jury as framed by counsel, is condemned. The better practice as a general rule is to give his own instructions. *State v. Collins*, 20 Iowa, 85.

MODIFICATION, SHOULD BE PERTINENT.

Modifications made by the court in an instruction asked by a party, shou'd be pertinent to the instructions as asked; and when the modification made is erroneous, if pertinent, the judgment will be reversed. *State v. Greene*, 20 Iowa, 424.

GROUPING THE FACTS TOGETHER AS PROVED ON TRIAL.


Where the court grouped the facts together as the evidence established then, and instructed that if such and such facts or circumstances are shown, you should find so and so, it was held that that mode of instructing was not necessarily erroneous, yet it should not be encouraged. *State v. Carnahan*, 17 Iowa, 256.

DUTIES OF COURTS GENERALLY IN RELATION TO INSTRUCTIONS.

It is the duty of the court to see that every case goes to the jury, and that they have clear and intelligent notions of the points they are to decide. And to this end he should give necessary instructions whether so requested by counsel or not, and his failure so to do is good grounds for a new trial where the verdict was not one which effectuated justice between the parties. *Owen v. Owen*, 22 Iowa, 271; *State v. Benham*, 23 Ib., 154; *State v. Brainard*, 25 Ib., 572; *State v. Collins*, 20 Ib., 85; *Muldrowney v. I. C. R. R. Co.*, 32 Ib., 176; *State v. O'Hagan*, 38 Ib., 504.

REFUSAL OF, WHEN WITHOUT PREJUDICE TO DEFENDANT NO ERROR.

Where the same propositions, in substance, are embodied in the instructions given as in those refused, it is not error to refuse them, especially so where the legal correctness of the former are not complained of. *State v. Donneker*, 40 Iowa, 340; *State v. Woodson*, 41 Ib., 425.



BASED UPON FACTS NOT IN EVIDENCE ARE ERRONEOUS.

An instruction based upon facts not in the evidence is erroneous. *State v. Fraunburg*, 40 Iowa, 555; *State v. Osborn*, 45 Iowa, 425.

MOTIVE.

See "Murder." *State v. Gillick*, 7 Iowa, 287.

WIFE OF DEFENDANT A COMPETENT WITNESS—EFFECT OF EVIDENCE.

To instruct a jury, where the wife of a defendant is introduced as a witness, "that her testimony should be received with great caution" is erroneous—she should be treated as other witnesses, and her credibility is to be judged of by the jury. *State v. Guyer*, 6 Iowa, 264; *State v. Rankin*, 8 Ib., 355; *State v. Nash*, 10 Ib., 88; *State v. Collins*, 20 Ib., 85.

ESCAPE OF PRISONER—ATTEMPT—EFFECT OF.

While an unexplained attempt to escape is a circumstance against a party accused of a crime, yet to instruct that such an attempt raises a "strong" presumption of guilt is erroneous. *State v. Arthur*, 23 Iowa, 430. As to evidence of an attempt to escape see "Escape."

UNDERTAKINGS OF BAIL, WHEN LIENS.

SECTION 4606. Undertakings of bail, from the time of filing the same in the office of the clerk of the district court in which they are required to be filed, shall be, and may be made, liens upon real estate of the persons acknowledging the same, in the same manner, to the same extent, and with like effect, as in judgments in civil actions.

SEC. 4607. They shall, when filed, be immediately docketed and indexed by the clerk of the court in which they are filed, as judgments in civil actions are required to be docketed and indexed.

SEC. 4608. Attested copies of such undertakings may be filed in the office of the clerk of the district court of the county in which the real estate is situated, in the same manner, and with like effect, as attested copies of judgments, and shall be immediately docketed and indexed in the same manner.

VERDICTS.

SECTION 4460. When the jury has agreed upon its verdict, it must be conducted into court by the officer having it in charge. The names of the jurors must then be called, and if all do not appear the rest must be discharged without giving a verdict. In such case the cause may again be tried at the same or another term.

SEC. 4461. If the indictment be for a felony, the defendant must be present at the rendition of the verdict. If it be for a misdemeanor, the verdict may be rendered in his absence.

SEC. 4462. When the jury have answered to their names, the court or the clerk shall ask them whether they have agreed upon the verdict, and if the foreman answers in the affirmative they must, on being required, declare the same.

SEC. 4463. The jury may either render a general verdict, or, where they are in doubt as to the legal effect of the facts proven, they may, except upon an indictment for libel, find a special verdict.

SEC. 4464. A general verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal on every material allegation in the indictment. Upon a plea of a former conviction or acquittal of the same offense it is either "for the state" or "for the defendant."

SEC. 4465. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense, if punishable by indictment.

SEC. 4466. In all other cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment.

SEC. 4467. On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly, and the case as to the rest may be tried by another jury.

SEC. 4468. If the jury render a verdict which is neither a general nor special verdict, the court may direct them to reconsider it, and it shall not be recorded until it be rendered in some form from which it can be clearly understood what is the intent of the jury, whether to render a general verdict or to find the facts specially and leave the judgment to the court.

SEC. 4469. If the jury persist in finding an informal ver-

dict, from which, however, it can be understood that their intention is to find for the defendant upon the issue, it shall be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment be given against him upon a special verdict.

SEC. 4470. When a verdict is rendered, and before it is recorded, the jury may be polled on the requirement of either party; in which case they shall be severally asked whether it be their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation.

SEC. 4471. When the verdict is given, and is such as the court may receive, the clerk may immediately enter it in full upon the record, and must read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the record, and the jury again sent out. But if no disagreement be expressed, the verdict is complete, and the jury must be discharged from the case.

SEC. 4472. If the defense be the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state that fact in their verdict. The court may thereupon, if the defendant be in custody, and his discharge is deemed dangerous to the public peace and safety, order him to be committed to the Iowa insane hospital, or retained in custody until he becomes sane.

SEC. 4473. If judgment of acquittal be given on a general verdict, and the defendant be not detained for any other legal cause, he must be discharged as soon as the judgment is given.

SPECIAL VERDICT.

SEC. 4474. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them.

SEC. 4475. The special verdict must be reduced to writing by the jury or in their presence, entered upon the minutes of the court, read to the jury and agreed to by them, before they are discharged.

SEC. 4476. The special verdict need not be in any particular form, but shall be sufficient if it present intelligibly the facts found by the jury.

SEC. 4477. The court must give judgment upon the special verdict as follows:

1. If the plea be not guilty, and the facts prove the defendant guilty of the offense charged in the indictment, or of any

other offense of which he could be so convicted under the indictment, judgment of acquittal must be rendered;

2. If the plea be of a former conviction or acquittal of the same offense, the court must give judgment of conviction or acquittal, according as the facts prove or fail to prove the former conviction or acquittal.

SEC. 4478. If the jury do not in a special verdict pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact from the evidence as established to their satisfaction, the court may order them to retire for further deliberation.

IMPEACHMENT BY AFFIDAVITS OF JURORS NOT PERMISSIBLE.

The verdict of the jury should not be set aside or impeached by the affidavits of the jury rendering it. *Wilson v. People*, 4 Park Cr. R., 619; *People v. Carnal*, 1 Park Cr. R., 256; *Vain v. Delavel*, 1 Term Rep., 11; *Owen v. Warburton*, 1 New Rep., 326; *Abel v. Kennedy*, 3 G. Greene, 47; *Cook, Sargent & Cook v. Sypher*, 3 Iowa, 484; *State v. Douglas*, 7 Ib., 414; *State v. Shelledy*, 8 Ib., 481; *Wright v. I. & M. T. Co.*, 20 Ib., 195; *State v. Gibbs*, 39 Ib., 321; *Com. v. Read*, 22 Grat-tan, Va., 924; 1 Gr. Cr. Rep., 267; 18 Wis., 594; *Woodward v. Leavitt*, 107 Mass., 453; 9 Am. Rep., 49.

AFFIDAVITS OF JURORS IN SUPPORT OF VERDICT ADMISSIBLE.

A distinction is made between affidavits of jurors in support of the verdict and those impeaching it. The former are held to be admissible, and the latter inadmissible. *Dana v. Tucker*, 4 Johns., 487; *Abel v. Kennedy*, 3 G. Greene, 51.

ADMISSIBLE ON ACCOUNT OF MISUNDERSTANDING INSTRUCTIONS.

Affidavits of jurors may be received to show that they entirely misunderstood the instructions of the court. *State v. Hascall*, 6 N. H., 352; *Packard v. United States*, 1 G. Greene, 225.

FORM OF VERDICTS—CORRECTED BY COURT.

An informal or ambiguous verdict may be corrected or explained at any time before the jury is discharged, and it is the duty of the court so to correct it. *Wright v. Phillips*, 2 G. Greene, 191; *Orton v. State*, 4 G. Greene, 140; *People v. Bush*, 3 Park Cr. Rep., 552; *Nelson v. People*, 5 Park Cr. Rep., 39.

CANNOT BE COMPELLED TO FILE AFFIDAVITS AS TO HOW THEY ARRIVED AT A VERDICT.

A jury cannot be compelled to file affidavits as to how they arrived at their verdict. *Forshee v. Abrams*, 2 Iowa, on page 579.

CANNOT BE COMPELLED TO FILE AFFIDAVITS AS TO INSTRUCTIONS OF COURT.

Jurors cannot be compelled to make affidavits, showing that they disregarded and refused to consider the instructions of the court. *Grady v. State*, 4 Iowa, 461.

SEVERAL COUNTS IN ONE INDICTMENT.

Where the indictment contains several counts it is the common practice for the jury to find a verdict of guilty upon those counts to which the evidence applies, and of not guilty to those to which it does not apply. *State v. Abrahams*, 6 Iowa, 119; *State v. Shelady*, 8 Ib., 481. Or the court may direct the jury to retire again, to say under which count they find the prisoner guilty. *People v. Graves*, 5 Park. Cr. Rep., 134.

IN MURDER CASES.

The verdict should show what degree the defendant was convicted of. *State v. Moran*, 7 Iowa, 237.

TAKING DEPOSITION INTO JURY ROOM, EFFECT OF.


The simple fact of taking depositions, with other papers, into the jury room, by the jury, is not, of itself, sufficient to render the verdict invalid, unless prejudice is shown, or that the same was read and used by them. *Shields v. Guffey*, 9 Iowa, 322.

LESS THAN OFFENSE CHARGED.

Where a defendant is charged with an offense of which there are different degrees, the verdict may find him guilty of the lesser although charged with the higher. *Dixon v. State*, 3 Iowa, 416; *State v. Shepard*, 10 Ib., 126.

PRESENCE OF DEFENDANT AND COUNSEL.

The law requires the presence of the defendant himself in some cases, but not that of his counsel. And in case of a conviction of an assault and battery the presence of the de-



fendant is not requisite, though the charge had been of a higher offense. *Hughes v. State*, 4 Iowa, 554; *State v. Shepard*, 10 Ib., 126. But in felonies he should be present. 1 Wend., 91. Counsel need not be present. 1 Texas Court of Appeals, 533.

FORM—SURPLUSAGE.

To use the words "as charged in the indictment" after the words in a verdict on a trial on information, "we the jury find the defendant guilty," is mere surplusage. *State v. McCombs*, 13 Iowa, 426.

INSUFFICIENCY OF VERDICT.

Where a verdict is insufficient, in not responding to the entire indictment, the court may set it aside. *State v. Redman*, 17 Iowa, 329.

RECEIVING STOLEN GOODS—FORM OF VERDICT.

See title "Larceny," "Verdict."

DEFECTIVE VERDICTS.

When the verdict returned on the trial of a criminal cause fails to pronounce affirmatively or negatively on all facts necessary to enable the court to give judgment, the order of the court should be, that the jury retire for further deliberation. When this order is not made it does not entitle a defendant to a discharge, but may set aside the defective verdict and order a new trial. *State v. Arthur*, 21 Iowa, 332.

DIRECTION OF VERDICT BY COURT.

Where there is no testimony sustaining the charge, or where it is slight in its nature the court may direct an acquittal and order the discharge of the defendant; but this right does not exist in the court, where there is a conflict of evidence. *State v. Smith*, 28 Iowa, 565.

GENERAL VERDICT.

A general verdict of guilty imports a conviction of the defendant on every material allegation of the indictment, and it is not erroneous for the court to make an inquiry of the jury on their returning into court "whether they found the defendant guilty of the particular offense charged in the indictment." *State v. Collins*, 32 Iowa, 36.

RECEIVED ON SUNDAY.

Under section 191, Code of 1873, the court has authority to receive a verdict and discharge a jury on Sunday. The decision in case of *Davis v. Fish*, 1 G. Greene, 406, was made in 1848; but since that we have Sec. 2686, Rev. 1860, and the section of the Code first above referred to to guide us in relation thereto. *Heidkooper v. Cotton*, 3 Mass., 56; *Houghtaling v. Osborn*, 15 Johnson, 118; *Heller v. English*, 4 Strobb, 586; *True v. Phinley*, 36 Me., 466; *Cory v. Silcox*, 5 Ind., 370; *Rosser v. McColly*, 9 Ind., 587; *McCorkle v. State*, 14 Ind., 39; *Joy v. State*, 14 Ind., 139; *Webber v. Merrill*, 34 N. H., 202; *Roberts v. Bower*, 5 Hunt., N. Y., 558; *Shearman v. State*, 1 Texas Court of Appeals, R., 215.

RIGHT TO POLL JURY.

Under section 4470, Code of 1873, either party has the right, in all cases, to have the jury polled upon the rendition of the verdict. See also *People v. Perkins*, 1 Wend., 91; *Blakely v. Sheldon*, 7 Johns., 32; *Fox v. Smith*, 3 Cow., 23. And this right is not waived by a consent of the defendant to a sealed verdict. *Stewart v. People*, 23 Mich., 63; 9 Am. Rep., 78; And, in case where a sealed verdict was returned, but before it was opened one of the jury became insane, and where the court received the verdict in the presence of the jury and denied a request to have them polled, it is held error. *Howe'l v. Deval*, 50 Mo., 272; 11 Am. Rep., 413.

JUDGE CANNOT COMMUNICATE WITH JURY NOR FURNISH BOOKS.

It is error for the court to have any communication with the jury, except in open court; and it is also error to furnish them the statute. *State v. Patterson*, 45 Ver., 308; 1 Gr. Cr. Rep., 490.

OMISSION TO CALL THE ROLL.

A failure to call over the names of the jurors before receiving their verdict does not prejudice a defendant, if the jury, in fact, were all present and had agreed. *People v. Rodondo*, 44 Cal., 538; 2 Gr. Cr. R., 411.

NON ASSENT TO.

Where, three days after the rendition of a verdict, the de-

fendant, in support of his motion in arrest of judgment, and for a new trial, offered the affidavit of one of the jurors that the verdict was never assented to by him, it was held inadmissible. *State v. Douglass*, 7 Iowa, 413.

WAIVER OF DEFENDANT'S RIGHTS.

WAIVER OF RIGHTS.

In a criminal prosecution for a felony, the defendant may waive the right, secured by the Constitution, to be confronted with the witnesses against him, and consent that the testimony of the witnesses taken down in a former trial, based upon the same facts, may be read as evidence to the jury as a substitute for the oral testimony and presence of the witnesses. *State v. Polson*, 29 Iowa, 133.

ILLEGAL TESTIMONY.

It has been expressly ruled, that when a prisoner permits illegal testimony to be given to the jury without objection, he cannot afterward raise any claim of privilege on account of the admission of such evidence. *Bishop v. State*, 9 Geo., 121; also, the following as bearing on the same question. *Ray v. State*, 1 G. Greene, 316; *State v. Nash*, 10 Iowa, 81; *McKinney v. People*, 2 Gilm., 540; 29 Iowa, 136.

WARRANT OF ARREST ON PRELIMINARY INFORMATION.

SECTION 4185. When complaint is made before a magistrate of the commission of some designated public offense, triable on indictment in the county in which such magistrate has local jurisdiction, and charging some person with the commission thereof, he may issue a warrant for the arrest of such person. The complaint may be in form substantially the same as provided in section four thousand six hundred and sixty-three of chapter fifty-two of this title.

SEC. 4186. The warrant of arrest on a preliminary information must be substantially in the following form:

COUNTY OF.....

THE STATE OF IOWA,

To any Peace Officer in the State:

Preliminary information upon oath having been this day

laid before me that the crime of (designating it), has been committed, and accusing A B, thereof:

You are, therefore, commanded forthwith to arrest the said A B, and bring him before me at (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at . . . , this . . . day of . . . , A. D. 18..

C . . . D . . . , *Justice of the Peace,*
(or as the case may be).

Subpoena as witnesses, E . . . F . . . and G : . . H . . .

SEC. 4187. The warrant must specify the name of the defendant, and if it be unknown to the magistrate, may designate him by any name. It must also state, by name or general description, an offense which authorizes the magistrate to issue the warrant, the time of issuing it, and the county, city, town, township or village where it was issued, and must be signed by the magistrate with his name of office.

SEC. 4188. It must be directed to "any peace officer in the state."

SEC. 4189. If the offense stated in the warrant be a misdemeanor, the magistrate issuing it must make an indorsement on the warrant as follows: "Let the defendant, when arrested, be admitted to bail in the sum of . . . dollars, if he desires to give bail," and fix in the indorsement the amount in which bail may be taken.

SEC. 4190. The warrant of arrest may be delivered to any peace officer for execution, and executed in any county in the state.

SEC. 4191. If the offense stated in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued it at the place mentioned in the command thereof, or, in the event of his absence or inability to act, before the nearest or most accessible magistrate in the county in which it was issued.

SEC. 4192. If the offense stated in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate or the clerk of the district court of the same county in which he was arrested or for the purpose of giving bail, and the magistrate or clerk before whom he is taken in such county, must take bail from him accordingly for his appearance at the district court of the county in which the warrant was issued, on the first day of the next term thereof.

SEC. 4193. On taking bail in the case provided for in the preceding section the magistrate or clerk taking such bail must make on the warrant an order, signed by him with his

name of office, for the discharge of the defendant, substantially as follows:

COUNTY OF (here name the county).

THE STATE OF IOWA.

To (here state the name of the officer who has the defendant in custody, with the addition of his name of office, thus, A B, sheriff of _____ county, according to the truth).

The defendant named in the warrant of arrest in your custody, under the authority thereof, for the offense therein designated, having given sufficient bail to answer the same, by the undertaking herewith delivered to you, you are commanded forthwith to discharge him from custody, and without unnecessary delay deliver this order, together with the said undertaking of bail, to the clerk of the district court of _____ county, on or before the first day of the next term thereof.

Dated at _____, this _____ day of _____, A. D. (or as the case may be).

_____, Justice of the Peace,
(Or as the case may be).

And must deliver the warrant with the order thereon, together with the undertaking of bail, to the officer having the defendant in custody, who shall forthwith discharge the defendant from arrest and without unnecessary delay, and on or before the first day of the next term of the court at which the defendant is required to appear, deliver or transmit by mail or otherwise the warrant, with the order thereon, together with the undertaking of bail, to the clerk of the court at which the defendant is required to appear, who shall forthwith file the same in his office; and the magistrate who issued the warrant shall return to the clerk the affidavits of the informant, and his witnesses upon which the warrant was issued, on or before the first day of the next term of the court, and the clerk shall, when the affidavits are returned by the magistrate, file the same in his office, with the warrant and undertaking of bail.

SEC. 4194. If bail be not forthwith given by the defendant as provided in the two preceding sections, the magistrate or clerk must re-deliver to the officer the warrant, and the officer must take the defendant before the magistrate who issued it, at the place mentioned in the command thereof, or if he be absent or unable to act, before the nearest or most accessible magistrate in the county in which the warrant was issued.

SEC. 4195. In all cases when the defendant is arrested he must be taken before the magistrate or clerk without unnecessary delay, and the officer must at the same time deliver to

the magistrate or clerk the warrant, with his return thereon indorsed, and subscribed by him in his name of office.

SEC. 4196. If the defendant be taken before a magistrate in the county in which the warrant was issued, other than the magistrate who issued it as hereinbefore provided, the affidavits on which the warrant was issued must be sent to such magistrate, or if they cannot be procured the informant and his witnesses must be subpoenaed to make new affidavits.

BAIL IN CASE OF FELONY—DUTY OF OFFICER MAKING ARREST.

Under section 4191, Code of 1873, which is the same as section 4539, Rev. of 1860, the officer making the arrest has no power to take bail of the defendant being charged with a felony; but it is his duty to take the prisoner before the justice who issued the warrant, as there is no provision made for admitting the defendant to bail for his appearance at the District Court until after the preliminary examination, or waiver thereof, nor by any magistrate in any other county than that in which the warrant for arrest issued. *State v. Cannon*, 34 Iowa, 323.

WRIT OF ERROR.

A writ of error will lie in all criminal cases in behalf of a defendant from a superior and courts of record to the Supreme and highest tribunal of a State. *State v. Van Horton*, 26 Iowa, 406; *People v. Corning*, 2 N. Y., 9; *Com. v. Cummings*, 3 Cush., 212. While it cannot be maintained in behalf of the State. *Com. v. Harris*, 2 Virginia Cases, 202; *State v. Royal*, 1 Scam., Ill., 557; *State v. Reynolds*, 2 Haywood's Tenn., R., 110; *People v. Comstock*, 8 Wend., 549.

TO INFERIOR AND JUSTICE'S COURTS.

The question may be considered as settled at least in Iowa, that the proper mode to review, in the District Courts, errors committed by justices and inferior tribunals, must be by writ of error and not appeal. Section 4703, Code of 1873, title Justices of the Peace and their courts, provides: "No appeal from the judgment of a justice of the peace in a criminal case shall be dismissed." Again, where a defendant was tried before a justice on a charge of an assault and battery, being found guilty and appealed, the court, per BALDWIN, C. J., say: "Several errors are assigned, which strike at

the irregularity of the proceedings before the justice, such as the failure upon the part of the prosecution to have the information read to defendant, or a plea of not guilty to be entered of record by the justice. These questions were all *waived* by the appeal and the cause stood for trial *de novo* upon its merits in the District Court. Rev., section 5100." *State v. McCombs*, 13 Iowa, 426. This section, 5100, as cited by the court in this case, is section 4702, Code of 1873, and still in force. It is also held that the remedy by appeal does not take away the remedy by writ of error. *Barnett v. State*, 36 Me., 198. The writ of error has also been recognized by our courts. *State v. Nichols*, 5 Iowa, 414; *State v. Rooney*, 37 Iowa, 30. The direct question was not raised in those cases, but they were rather based on sections 2349, 2350, Code of 1851, which are copied in the Code of 1873, as sections 3597 and 3598, in addition to what we concede to be the well settled law in favor of the allowance of writs of error. This question is now pending in the Iowa Supreme Court, where the only point made is as to whether a writ of error lies to inferior courts, in *State v. Flinn*, submitted at the December term, 1878, and opinion to be filed at the March term, 1879, at Council Bluffs.

Form of an Affidavit for Writ of Error.

STATE OF IOWA, } Before . . . , a Justice of the Peace of . . . township, . . .
 V. } county, Iowa.
 } *Affidavit for writ of error.*

I, . . . being duly sworn, upon oath do say that I am the defendant in the above entitled cause; that on the . . . day of . . . , 18 . . . , an information was filed before the justice above named, charging me with the crime of . . . , whereupon the said justice issued his warrant of arrest, by virtue of which I was arrested and brought before said justice, and required to plead; whereupon I caused to be filed an affidavit and motion for a change of venue, which is in words and figures following, [here copy affidavit for change] which motion and affidavit said justice overruled, to which ruling I at the time excepted. I thereupon caused to be filed a demurrer to the information (or motion, as the case may be) which demurrer, or motion, the said justice overruled, to which ruling I excepted at the time. I thereupon plead not guilty, and was compelled to proceed to trial, and upon the hearing of the cause was adjudged guilty, and sentenced to pay a fine of . . . dollars, to all of which I excepted, and file this affidavit as my complaint for the errors committed in this cause, as follows:

1. The said justice erred in overruling this affiant's motion for a change of venue.
2. The said justice erred in overruling this affiant's demurrer [here give such other reasons as are applicable to the case], and affiant therefore states that he was erroneously convicted of said crime.

Subscribed, sworn to, etc.

Where the defendant files his affidavit for a writ of error to suspend the sentence of the court, it is necessary that the de-

defendant should file at once, the same as in case of an appeal, instead of an appeal bond, a *supersedeas bond*, to stay all proceedings until said errors complained of can be heard in the District Court. Which bond may be in the following form:

We, the undersigned . . . , as principal, and . . . , as surety, acknowledge ourselves indebted, and by this undertaking bind ourselves, severally and jointly, well and truly to pay unto the State of Iowa the sum of . . . dollars, upon conditions as follows: Whereas the said . . . first named was convicted on a charge of . . . on the . . . day of . . . , before . . . , a justice of the peace of . . . township, . . . county, Iowa, and sentenced to pay a fine of . . . dollars, and whereas the said defendant has declined to pay said fine, and is about to file in the office of the Clerk of the District Court of . . . county, Iowa, his affidavit, alleging that certain errors were committed in the proceedings had before said justice, wherein the State of Iowa was plaintiff and the said . . . was defendant, and asking that a writ of error be issued to said justice, to certify up all the proceedings in said cause had. Now, if the said . . . shall appear at the next term of the District Court in and for said . . . county, Iowa, and prosecute the said errors complained of, and comply in all respects with the orders, judgment and directions of said District Court, then this obligation to be void.

The within bond is by me this day approved.

., J.P.

The bond should be in such sum as may be deemed necessary and sufficient to procure the attendance of the defendant at the next term of the District Court of the proper county. A notice to the prosecution of the suing out of this writ is unnecessary.

Upon the filing and approval of such bond, the defendant must be discharged.

HEARING IN THE DISTRICT COURT.

On the hearing of a writ of error from a justice, the court should only notice and pass upon such errors as are assigned by the defendant, and should not, upon its own motion, notice or pass upon errors not assigned. *Santo et al. v. State*, 2 Iowa, 165; *State v. Nichols*, 5 Iowa, 418.

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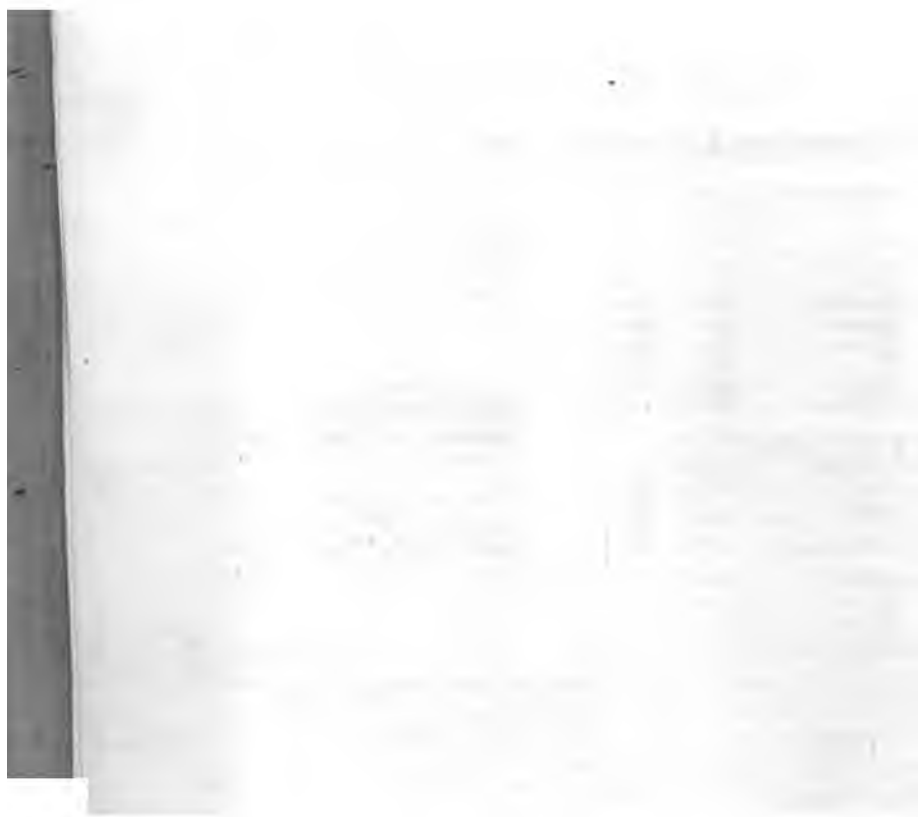


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